



REPLY TO:  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

**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

REBECCA SPROUT

v.

DOCKET NO. 17-86-124

HARRISON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Rebecca Sprout, has been employed by the Harrison County Board of Education (Board) as a secretary assigned to Gore Junior High School since 1970. Ms. Sprout filed a level one grievance on January 28, 1985 in which she alleged violations of W.Va. Code §§18A-2-6, 18A-4-14 and 18A-4-8 when she was required to work one-half hour longer per day than her employment contract stipulated.<sup>1</sup> The matter was waived to level three where it was denied by Superintendent Robert Stemple. The Board granted the grievance at level four on March 27, 1985 but reversed its decision on August 20. The grievant subsequently filed a Petition for Writ of Mandamus with the Circuit Court of

---

<sup>1</sup>This matter was originally filed under the State Board of Education Policy No. 5301 grievance procedure which was in effect until July 1, 1985 when the Education Employees Grievance Board was created by W.Va. Code §§18-29-1 et seq.

Harrison County in which she requested the Court to Order the Board to reinstate its original decision granting the grievance. By Order dated February 24, 1988 the Court denied the petition and, in an appended letter, upheld the Board's right to reconsider a decision and advised the grievant "...to continue to seek relief utilizing existing administrative remedies." Ms. Sprout filed a level four grievance with the Education Employees Grievance Board on February 25, 1988 and the matter was scheduled for hearing seven times before a hearing was ultimately held on April 6, 1989.<sup>2</sup> Proposed findings of fact and conclusions of law were submitted by May 26.

The facts of this matter are not in dispute. The grievant was hired in October 1970 as a secretary at Gore Junior High School and was to work six and one-half hours per day at the stated hourly wage.<sup>3</sup> The grievant was rehired for the 1971-72, 1972-73 and 1973-74 school terms, also for six and one-half hours per day. Payroll records establish that the grievant continued to work six and

---

<sup>2</sup>Although this matter was postponed a great many times each request was submitted with the agreement of opposing counsel or as a joint motion and was granted for good cause shown.

<sup>3</sup>At this time secretaries assigned to elementary schools worked six and one half hours per day while secretaries assigned to high schools worked seven hours per day and were paid a higher hourly rate. Secretaries assigned to purely junior high schools were treated as elementary school secretaries regarding hours and wages until 1979. See infra.

one-half hours until 1979 when a new principal, Morris Clemons, advised the grievant that she was to be working seven hours daily <sup>4</sup> (T.12).<sup>5</sup>

The grievant's timesheets establish that she worked seven hours per day the entire 1979-80 school term; six and one-half hours in September and October of 1980 and January 1981 and seven hours the remainder of the 1980-81 term; seven hours during the 1981-82 term; six and one-half hours in September, October and November of 1982 and seven hours for the remainder of the 1982-83 school term and thereafter to the present. The fluctuation in the grievant's hours was the result of directives from various unidentified individuals regarding the length of her work day. For example, when a supervisor told her that she was to work six and one-half hours she did so until she was told by another employee in the Finance Department that she was to work seven hours (T.13). Apparently employees in different offices had differing opinions as to the length of her workday and the matter remained unresolved throughout this extended period of time. The issue again arose during the 1984-85 school

---

<sup>4</sup>The grievant was not the only employee in this situation. Anita Swecker, a retired secretary formerly assigned to Bridgeport Junior High School, testified at level four that she also had worked six and one-half hours until 1979 when she was told to work seven hours per day.

<sup>5</sup>Transcript references are to the hearing held before the Board of Education on March 25, 1975 included in the record as Exhibit F.

term when Principal Clemons inquired by letter dated October 23, 1984 and directed to Robert Skidmore, Director of Personnel, as to the grievant's working hours and suggested an extension of her work day. Following this letter the grievant met with Superintendent Stemple, in either November or December, who advised her that she was to work a seven-hour day. A grievance was filed in January 1985.

The grievant argues that the increased time to be worked was contrary to the terms of her continuing contract which remains in effect and that any modifications could only be made with her consent as provided by W.Va. Code §18A-2-6. She asserts that the time she works must include a half-hour lunch break as guaranteed by W.Va. Code §18A-4-14 and that her schedule may not be construed to include six and one-hours of actual work plus a one-half hour lunch break.<sup>6</sup> Further, she argues that the increase in time resulted in a reduction of her salary in violation of W.Va. Code §18A-4-8 which prohibits a service employee's being relegated to any condition of employment which would result in a reduction of salary, rate of pay, etc.

The Board argues that the grievance was not timely filed under State Board of Education Policy 5301 and that

---

<sup>6</sup>This issue apparently arose as a result of Mr. Clemons' letter of October 23 in which he referred to work hours and a lunch half-hour. It does not appear that the Board has ever asserted that the grievant would not be compensated for the half-hour lunch recess.

any relief would now be barred by the doctrine of laches. The Board cites the Policy 5301 requirement that the level one grievance be filed within fifteen days of the occurrence of a single event, or the most recent occurrence of an ongoing problem or from the date upon which the employee knew or reasonably should have known of the event upon which the grievance was based. The Board argues that the grievable event was the change of hours in 1979 and asserts that the grievant's failure to file a level one grievance until 1985 indicates acceptance of the change in her schedule. Alternatively, the Board argues that the lapse of such a lengthy period of time constitutes an inexcusable lack of diligence by the grievant and her attempt to pursue a remedy at this time is barred by the doctrine of laches.

The Board also argues that the grievant failed to properly pursue the matter through the grievance process. Policy 5310 provided that if any employee was not satisfied with the decision of the county board of education, the grievant could appeal the decision to the State Superintendent of Schools within forty-five days of receiving the board's decision. The grievant did not timely appeal to the State Superintendent of Schools or to the Education Employees Grievance Board but choose instead to file a petition in Circuit Court. The Board argues that filing the petition did not toll the appeal period as nearly two months time elapsed between the Board's decision and the filing of the

petition and because the petition addressed a procedural defect and did not seek review of the substantive issue.

The Board next argues that the matter was not remanded to level four by the Circuit Court but that Judge McCarthy merely suggested that the grievant continue to exhaust her administrative remedies. The Board asserts that even if the Court intended to remand the matter it could not have done so because no action was pending before the Education Employees Grievance Board as the grievant had failed to timely file an appeal.

Should the matter now be considered properly pending before the Grievance Board, the Board argues that the grievant can not prevail on the substantive issue since the grievant is employed under a continuing contract for a particular school year at a specific salary and that neither her continuing contract nor Code §§18A-2-6 or 18A-4-8 require her consent before it could establish her working hours. Finally, even if the change was not implemented properly, the grievant had consented to the change as evidenced by her acquiescence to the new schedule for nearly five years.

The grievant responds that she has diligently pursued the relief sought, first informally and then through the grievance process. She argues that a level four appeal was timely filed as the pendency of a suit operates to suspend the statute of limitations when the parties and the subject matter are the same. Although the petition presented a

procedural question rather than seeking review of the Board's decision on the substantive issue, the grievant asserts that the questions were so closely related that they must be treated as one action. Additionally, the grievant makes a "judicial economy" argument that a ruling favorable to her on the petition would have negated the need for further grievance proceedings.

The grievant argues that the Circuit Court Order denying the petition in effect remanded the case to level four. The direction "...to continue to seek relief utilizing existing administrative remedies" is interpreted by the grievant to be a remand and she urges that when the intent is clear it is unnecessary that a certain "magic word" be used by the Court.

In response to the Board's argument that she would be barred from the claim for back wages by the doctrine of laches, she asserts that the institution would not suffer any prejudice since they have long been apprised of the situation and have benefited from the extra one-half hour of work they forced her to render.

To determine whether the grievance was timely filed at level one it is necessary to review the requirements of the grievance procedure then in effect. The relevant sections of State Board of Education Policy 5301 follow:

#### SECTION IV. PROCESSING OF GRIEVANCES

As the primary goal of the grievance procedure is to establish better communication between county board of education employees and persons charged with the responsibility of administering and supervising the public schools, it is important for employees to discuss their concerns, problems, and probable grievances with their immediate supervisor. Accordingly, any aggrieved employee will first informally discuss his/her grievance with his/her immediate supervisor prior to filing a formal grievance under this procedure.

##### A. Level I

In the event that the grievance is not resolved informally, a formal written grievance may be filed with the immediate supervisor by the aggrieved or by a group of aggrieved employees in behalf of themselves and all others so affected. The grievance shall be on the prescribed form and will be signed by the aggrieved employees(s). The grievance shall be filed within FIFTEEN DAYS of the occurrence of a single event, within FIFTEEN DAYS of the most recent occurrence of an ongoing problem, or within FIFTEEN DAYS of the date when the employee did know or reasonably should have known of the occurrence of the event upon which it is based.

#### SECTION II, Paragraph F

Days shall mean the days of the employee's employment term, exclusive of Saturday, Sunday, official holidays, or when schools are closed under provisions of §18A-5-2. During the summer, days shall mean the days the county board office is open.

#### SECTION III, Paragraph C

Since it is important that a grievance be processed as rapidly as possible, the number of days indicated at each level shall be considered as a maximum, and every effort should be made to expedite the process. The time limit specified may, however, be extended by mutual written agreement. In the event that such an extension is not mutually agreed upon, if an aggrieved employee fails to file a grievance or appeal a decision within the prescribed time limits, the grievance shall be lost. An employee may withdraw a grievance at any level by notifying, in writing, the administrator in charge at that level.

The change in the grievant's work schedule was not limited to a day, a week or a year but has been continuous since 1979. While the initial change occurred in 1979 the problem remains ongoing since the grievant's schedule has not reverted to the six



and one-half hours she previously worked. Having determined the matter to be an ongoing problem rather than a single event, the grievance must be ruled timely filed.

The next issue to be addressed is whether the grievance has been properly processed. The Board's assertion that the grievance was not timely appealed to the State Superintendent of Schools or to the Education Employees Grievance Board must be considered in relation to unique events which were occurring at this time. The Board reconsidered the grievance and reversed its prior decision on August 23, 1985. Although the Education Employees Grievance Board had become effective July 1, 1985 it had not yet been implemented and the State Superintendent was no longer considering grievances even though they had been filed under Policy 5301. This situation left the grievant with no avenue of administrative appeal at that time. On October 21 the grievant filed a Petition for Writ of Mandamus in the Circuit Court of Harrison County. This action was filed within forty-five working days of the second Board decision issued on August 23.

Neither party has presented persuasive authority as to whether the filing of the Petition seeking a ruling on a procedural issue would toll the statute of limitations for an appeal of the substantive issue. Therefore, in consideration that a ruling favorable by the Court to the grievant could have resolved the matter making further consideration of the substantive issue unnecessary and because no functional forum of administrative appeal was available to the grievant in August 1985 it is

determined that the filing of the petition within the forty-five day time limitation kept the matter active.

Even if the Petition filed in Circuit Court did not toll the time period for appeal the grievance would still be properly considered at level four as it was remanded by the Court. The directive "...to continue to seek relief utilizing existing administrative remedies" may reasonably be interpreted to remand the matter to the appropriate administrative level. If the Board's interpretation, that the matter was not remanded but that the Court merely suggested that the grievant continue to exhaust her administrative remedies and/or that Judge McCarthy could not have remanded the matter even if he had intended to do so since the matter was not pending before the Grievance Board, is accepted, consideration of the grievance at level four would still be proper inasmuch as the Board of Education has already issued a decision for this grievance. No purpose would be served in requiring the grievant to repeat the procedure to level four and the doctrine of exhaustion of administrative remedies is inapplicable where resorting to available procedures would be an exercise in futility. State ex rel. Board of Education v. Casey, 349 S.E. 2d 436 (W.Va. 1986).

Having disposed of the procedural issues and finding the matter to be properly considered at level four the substantive issue may be addressed. There is no dispute that the grievant's work hours were increased without her consent. While the Board was not required to obtain her consent in setting the hours she was to work, increasing the length of her work day without a

commensurate increase in salary has relegated the grievant to a condition of employment resulting in a reduction of her salary, rate of pay, compensation or benefits to which she would have been entitled by continuing in the same job position and classification for subsequent years, resulting in a violation of W.Va.Code §18A-4-8.

In determining the appropriate relief to be awarded consideration must be given to the Board's argument that an award of relief retroactive to 1979 (approximately \$5,000) would cause it to suffer substantial prejudice in meeting such an obligation and is therefore barred by the doctrine of laches. Although the Board has benefited from the extra time the grievant has worked, it was she who allowed the matter to continue for an extended period of time prior to filing a grievance. A party must exercise diligence when seeking to challenge the legality of a matter involving the expenditure of public funds, and the failure to exercise such diligence constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E. 2d 246 (W.Va. 1987). Accordingly, the request for relief prior to filing the level one grievance is denied; however, the grievant is granted the appropriate amount of compensation to which she is entitled for the additional one-half hour of work effective January 28, 1985.

In addition to the foregoing narration the following specific findings of fact and conclusions of law will be made.

### Findings of Fact

1. The grievant has been employed by the Harrison County Board of Education as a secretary assigned to Gore Junior High School since October 1970.

2. Attachments to the grievant's continuing contract, entered into the 1973-74 school term, provided that she work six and one-half hours per day at an hourly wage.

3. Board policy effective during the 1970's established the workdays of school secretaries to be six and one-half hours at elementary schools and seven hours at high schools. The length of the workday for junior high school secretaries was apparently not addressed.

4. The grievant continued to work six and one-half hours per day until 1979 when she was advised that she was to work seven hours per day.

5. The grievant worked seven hours per day during the 1979-80 school term; six and one-half hours in September and October 1980 and January 1981 but seven hours the remainder of the 1980-81 term, seven hours in 1981-82, six and one-half hours in September and October 1982, seven hours the remainder of the term and to the present.

6. A level one grievance was filed in January 1985. The Board granted the grievance at level three and several months later reversed the decision. The grievant filed a petition for Writ of Mandamus in the Harrison County Circuit Court where no action was taken until January 1988. The petition, which

requested that the Board be Ordered to reinstate its first decision, was denied by Order dated February 24, 1988 and the grievant filed a level four grievance appeal on February 25, 1988.

### Conclusions of Law

1. After three years of acceptable employment each service personnel employee who enters into a new contract of employment with the board of education shall be granted continuing contract status which shall remain in full force and effect except as modified by mutual consent of the school board and the employee unless or until the employee is terminated or resigns from employment. W.Va. Code §18A-2-6.

2. No service employee, without his written consent, may be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years. W.Va. Code §18A-4-8.

3. Increasing the number of hours to be worked with no commensurate increase in salary and without the grievant's written consent was in violation of W.Va. Code §§18A-2-6 and 18A-4-8.

4. The grievant's lack of diligence in seeking a remedy to an ongoing grievable problem which involves the expenditure of public funds constitutes laches prohibiting an award of relief for that time prior to the filing of a grievance. Maynard v. Board of Education of Wayne County, 357 S.E. 2d 246 (W.Va. 1978).

5. The grievant is entitled to compensation for the additional half-hour of work effective January 28, 1985 at the applicable rate of pay.

Accordingly, the grievance is **GRANTED** in part and **DENIED** in part and the Board is **ORDERED** to adjust the grievant's salary in compliance with this decision.

Either party may appeal this decision to the Circuit Court of Harrison County or to the Circuit Court of Kanawha 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: September 11, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER