WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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v. Docket No. 89-17-292

HARRISON COUNTY
BOARD OF EDUCATION

D E C I S I O N

Grievants, ten elementary school teachers employed by Respondent Harrison County Board of Education, filed a grievance March 10, 1989, alleging "Nonuniformity in additional compensation for classroom teachers with more than 25 pupils in their classes during the 1987-88 school year, in violation of [W.Va. Code] §18A-4-5a." Their grievance, filed directly at Level II apparently because of lack of authority at Level I,[1] was denied at that level on the

[1]The record does not indicate that the Level I evaluators agreed in writing to Grievants' filing directly at Level II, as required by W.Va. Code §18-29-3(c).

grounds that it was untimely filed and its consideration was waived at Level III. Upon appeal to Level IV Grievants requested that the decision be made on the evidence presented at Level II.[2]

Respondent contends that the grievance was not timely filed since Grievants knew from the beginning of the 1987-1988 school year that their classes had more than 25 pupils, which undisputedly was violative of W.Va. Code §18-5-18a, "Maximum teacher-pupil ratio." Respondent maintains that Grievants were therefore required to file within fifteen days of the beginning of that school year and, in any case, were not justified in waiting until Spring 1989, one-and-a-half years later.

Most of the information as to why this grievance was filed in March 1989 comes from the testimony of Richard Stonestreet, of the West Virginia Education Association, who represented Cynthia Tanzey and Kathryn Mason, elementary teachers in Harrison County who did bring a grievance in Fall 1987 alleging that the numbers of their pupils violated Code §18-5-18a. Mr. Stonestreet testified that in September 1987 he recommended that no grievance be brought until the West Virginia State Superintendent of Schools determined

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[2]Grievants appealed to Level IV on June 27, 1989, but the record was not received until November 8, 1989. Upon Respondent's request, for good cause, the deadline for mailing proposed findings of fact and conclusions of law was extended to January 19, 1990. The record was complete January 22, 1990.

whether Respondent was entitled to waivers, authorized by law, for the illegal teacher-pupil ratios. However, Ms. Tanzey and Ms. Mason, not wishing to wait, filed their grievance in September 1987. Respondent's requests for waiver were subsequently denied and the denials were confirmed on reconsideration. Mr. Stonestreet testified that by this time the grievance was at Level IV and Hearing Examiner Jerry Wright's decision was issued in February or March of 1988. Mr. Stonestreet's continued testimony was that, while Mr. Wright denied Ms. Tanzey and Ms. Mason their primary requested remedy of removal of the excess students, he did grant them the remedy of payment for the extra pupils. Mr. Stonestreet continued,

> It was my custom whenever we got a decision, if it were [sic] a victory--still is--to talk to representatives of the board, the board staff and the board attorney, to see quickly what their intentions are, whether or not to appeal. So I did have some discussions at that time--again, this was around the time of the decision--ith Mr. Riley, who was then the Board attorney, and with Mr. Skidmore. Teachers were calling me. Some of the grievants, in fact, were calling me. ... I had been advising them before "wait and see," because the waiver issue had not yet been resolved, the appealing of the waiver. Once the decision was in, then I said, "Let's wait and see what the Board's going to do. We have some time here to look at this." I believe Mr. Riley initially indicated that he thought the Board would not appeal, but then, of course, they did. As was stated in one of the opening statements, that Tanzey/Mason was appealed to circuit court. When I spoke with Mr. Skidmore, he indicated to me that whatever the outcome would be that he would recommend that everybody would be paid--similarly situated individuals would be paid. I also spoke--and this was still within fifteen days of the Tanzey/Mason decision. I also spoke with Ed Stephenson, who was my predecessor here in Region 9, and asked him what had been the practice, if he could remember, in the past as far as the Harrison County Board granting the same relief to similarly situated individuals who had not signed on

> the grievance, and he indicated that his recollection was that, indeed, they had, that that had been the case. So, indeed, I did advise the grievants that it was unnecessary, that they simply could await the outcome of the Tanzey/Mason matter, whatever it would be. I think, for many reasons, we were expecting to win the matter in the circuit court, and that--as was indicated, that was resolved. I think that's it.

Mr. Stonestreet's testimony is essentially consistent with the facts provided in Tanzey v. Harrison Co. Bd. of Educ., Docket No. 17-87-258-2 (Apr. 25, 1988), although the decision was issued later than Mr. Stonestreet recollected. That decision states that the requests for waiver were denied November 1987 and again the next month and in January 1988. The record of that case on file with this Grievance Board also shows that the decision was appealed to the Circuit Court of Harrison County on May 26, 1988.

Instructive in this matter are Harris v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989), and Watts v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Apr. 28, 1989). Both cases resulted from the decision Isaacs v. Lincoln Co. Bd. of Educ., Docket No. 22-88-122 (Sept. 28, 1988), where it was held that the respondent Lincoln County Board of Education had violated W.Va. Code §18A-4-8b(b) in failing to provide the grievant bus operators supplemental pay for library runs made in the 1987-88 school year. The grievants in Harris, other bus operators who had also made the library runs, also alleged a violation of W.Va. Code §18A-4-8b(b) and contended that their claim was timely because it was filed within fifteen days of when they were

told the outcome of the Isaacs decision. It was held in Harris,

> [Grievants] err in arguing that the grievance was timely filed because it was filed within fifteen days of the date when the bus drivers became aware that the library runs had been violative of Section 18A-4-8b(b). The date when an action or practice is determined to be violative of the Code is not the crucial date for timely filing of a grievance. See Ryan v. Berkeley Co. Bd. of Educ., Docket No. 02-88-060 (Sept. 29, 1988); Scarberry v. Mason Co. Bd. of Educ., Docket No. 26-86-291-1 (Mar. 26, 1987). The latest possible "event upon which the grievance is based" or "the most recent occurrence of a continuing practice giving rise to a grievance" in this case would be when Grievants made the library runs without supplemental pay. The "date on which the event became known to the grievant," W.Va. Code §18-29-4(a)(1), could not apply to this case since of course Grievants were aware that they were making the library runs without supplemental pay. Accordingly, the latest possible date on which Grievants could have timely filed was fifteen days after the last library runs they made in the 1987-88 school year. Since Grievants did not file until late December 1988 or January 1989, their grievance was untimely filed.

The grievants in Watts were still a third group of bus operators who had driven the library runs. They argued that their grievance was timely because it had been filed within fifteen days of the respondent board's decision to pay only the named grievants in the Isaacs case and that the board's decision was contrary to the requirement 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[.]" In Watts the grievance was found to be timely, as the grievants contended, but meritless. The decision held that Code §18A-4-5b

> 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 or pay, benefits," or "increments." Nor were they compensation within the meaning of Code §18A-4-5b. Although the Isaacs decision ordered Responent 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 payment is not the "compensation" from an employer to an employee intended by the uniformity provision.

Watts mandates rejection of Grievants' contention that they are entitled to compensation under W.Va. Code §18A-4-5a[3] equal to that paid Ms. Tanzey and Ms. Mason. In settling the case after appeal, agreeing to pay those grievants damages, Respondent, like the respondent in Watts, was not acting as an employer providing compensation to employees. Accordingly, while Grievants may have filed within fifteen days of Respondent's decision to pay only Ms. Tanzey and Ms. Mason[4] and their claim based on that decision would be timely, they have not established any valid claim of nonuniform compensation.

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[3]Grievants rely on the provision thereof that "[u]niformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county[.]"

[4]The date of Respondent's decision to pay only Ms. Tanzey and Ms. Mason is not actually of record in this matter.

However, Grievants' position actually encompasses more than the argument made in Watts. Grievants contend that they filed

> within fifteen (15) days of their and their representative's first knowledge of Respondent's denial [sic] not to honor Administrative Liaison Officer Skidmore's commitment to treat Grievants in a similar fashion as Tanzey and Mason.

They cite Blevins v. Fayette Co. Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987), where it was held,

> An employee who makes a good faith, diligent effort to resolve a grievable matter with school officials in lieu of filing a grievance and relies in good faith upon the representation of these officials that the matter will be rectified will not be time barred from pursuing the grievance pursuant to W.Va. Code, 18-29-4 upon the diligent filing of a grievance immediately after the cessation of or apparent futility of the efforts,

and Steele v. Wayne Co. Bd. of Educ., Docket No. 50-87-062 (Sept. 29, 1987), cited by Blevins. Under this caselaw, if such a reliance were established, claims by Grievants that Respondent violated Code §18-5-18a[5] could be found timely.

Under the holding in Harris a claim based on Code §18-5-18a could have been timely brought within fifteen days of the last day of school, Spring 1988, since at least some of the violative pupil ratios persisted until the end of school; therefore, Respondent's contention that Grievants

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[5]While Grievants do not expressly base their claim on this provision at Level IV, Respondent's violation of it lies at the heart of this grievance and amendment of the pleadings to so allege would be allowable pursuant to W.Va. Code §18-29-3(j).

were required to file within fifteen days of the start of school is rejected. It is accordingly not necessary to address various contentions of the parties regarding why Grievants did not file during the school year.[6] The issue remaining is whether Grievants established that they or their representative deferred filing from the end of the 1987-1988 school year until the next spring because of reliance of the type discussed in Blevins and Steele.

A promise of a school board, through its agents, to employees like-situated to others who have brought a grievance that they will be paid equally as the grievants if the case is won would be considered a representation "that the matter will be rectified" under Blevins/Steele. However, Mr. Stonestreet's testimony was merely that Mr. Skidmore "indicated" that he would "recommend" that like-situated employees would be paid. Such testimony cannot support that a promise was made to Grievants they would be paid. Moreover, a representation fulfilling the Steele and Blevins standards only tolls a filing deadline; it has no effect when made after the deadline. Accordingly, even if Mr. Skidmore's statement could be considered a promise, it would not toll the filing requirements if made later than fifteen days after the end of school, the deadline for Grievants'

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[6]For example, Grievants make an apparent estoppel argument that Respondent's position in the Tanzey case was that it was premature to file a grievance before it was finally determined if a waiver would be granted.

filing. Mr. Stonestreet's testimony suggests that Mr. Skidmore's representation was made after the Tanzey decision was appealed in May 1988 and it could have been made much later. For example, if it was made in August, any reliance on it would of course not justify Grievant's prior failure to file within fifteen days of the end of school. Finally and most importantly, Mr. Stonestreet's testimony does not establish that the delay in filing was due to reliance on Mr. Skidmore's representation. Rather, from Mr. Stonestreet's testimony it is clear that he assumed, apparently partially because of his understanding that in the past Respondent had paid employees like-situated to successful grievants,[7] that Grievants would be paid if the prior suit were won and advised them to wait.[8] Such an assumption does not provide grounds for tolling a filing deadline. Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Since no further justification for the delay in filing is supported by the record, the grievance is time-barred.

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[7]Mr. Stonestreet's testimony would be inadequate to establish what had been Respondent's past practice in any case, for, besides being hearsay on the issue, it indicates that Mr. Stephenson had not been certain that it had actually been Respondent's past practice to pay such employees.

[8]The only grievant who testified as to why she had not filed earlier stated, "We were still waiting for the decision of the case that we had filed on behalf of us. We were under that assumption, anyway."

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

Findings of Fact

1. Grievants, elementary school teachers who were assigned more than 25 pupils during the 1987-1988 school year, began grievance proceedings March 10, 1989.

2. Neither Respondent nor its agents promised Grievants that they would be paid equally to other elementary school teachers who had filed a grievance in Fall 1987 alleging that their being assigned more than 25 pupils violated W.Va. Code §18-5-18a. Moreover, Grievants did not rely on any representations of Respondent's agents in delaying filing their grievance. Rather, Grievants' representative assumed that they would be paid like the prior grievants if that prior grievance was won, advising Grievants against filing a grievance and to "wait and see."

Conclusions of Law

1. While Grievants' claim that Respondent violated W.Va. Code §18A-4-5a may have been timely if it was filed within fifteen days of Respondent's decision not to pay them equally to the employees who had brought the prior grievance, that decision is not violative of W.Va. Code §18A-4-5a since payment of damages to a grievant upon settling his or her claim is not compensation within the terms of that

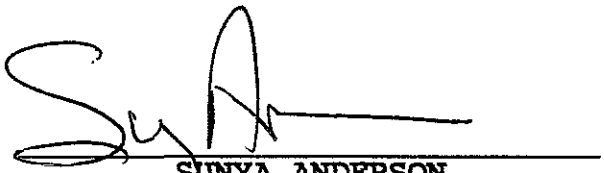
provision. See Watts v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Apr. 28, 1989).

2. A claim alleging that during the 1987-1988 school year Respondent violated W.Va. Code 18-5-18a could have been timely filed within fifteen days of the end of school, Spring 1988. See Harris v. Lincoln Co. Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989). Grievants did not file within that time-frame and did not establish that they delayed filing until March 1989 because of any good-faith reliance upon any representation of an agent of Respondent that the matter would be rectified. See Blevins v. Fayette Co. Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987); Steele v. Wayne Co. Bd. of Educ., Docket No. 50-87-062 (Sept. 29, 1987). Rather, they and their representative assumed that Respondent would pay them like grievants in a prior suit. Such an assumption does not provide grounds for tolling a filing deadline. See Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievants' claim is therefore time-barred.

Accordingly, the grievance is **DENIED**.

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



SUNYA ANDERSON
HEARING EXAMINER

Dated: February 22, 1990