WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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JOHN OBLINGER

v. Docket No. 89-22-552

LINCOLN COUNTY
BOARD OF EDUCATION

D E C I S I O N

Grievant, John Oblinger, employed by Respondent Lincoln County Board of Education as a homebound teacher, filed a grievance May 17, 1989, alleging that he has not been properly paid for work as a Textbook Coordinator and that he is entitled to a contract for such position.[1] The grievance was denied at Levels I and II and consideration of it was waived at Level III. Grievant appealed to Level IV on September 18, 1989, and hearing was held October 17. With receipt of proposed findings of fact and conclusions of law from Grievant on November 20, 1989, this matter may be decided.[2]

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[1]Grievant also alleged nonuniformity in assignment of caseloads of homebound students but advised the undersigned at hearing that he was not pursuing that claim.

[2]Respondent waived submission of proposals.

The essential facts are not in dispute. For several years Grievant had assisted Paul Garrettson, Respondent's Attendance Director and Textbook Coordinator, with ordering textbooks. The time Grievant spent in the summer he was allowed to take off as compensatory days during the regular school year. With passage of legislation requiring that an attendance director be full-time,[3] which prohibited Mr. Garrettson's continuing to be Textbook Coordinator, Superintendent Stephen Priestley, thinking that Mr. Garrettson was about to retire, recommended to Respondent that Grievant be appointed Textbook Coordinator and that Mr. Garrettson's contract be reduced from 240 to 200 days because the extra forty days were for work as Textbook Coordinator in the summer. On July 26, 1988, Respondent voted to reclassify Grievant as "Homebound Teacher/Textbook Coordinator effective with the 1988-89 school year." Grievant acted as Textbook Coordinator for the 1988-89 school year, taking off time during the regular school term for the days he so spent during the summer 1988. By memo of June 5, 1989, Mr. Priestley directed Grievant not to work during the summer as Textbook Coordinator, and Grievant did not. Respondent had not accepted Mr. Priestley's recommendation that Mr.

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[3] W.Va. Code §18-8-3, amended in 1986, provides in pertinent part, "The county board of education of every county, not later than the first day of August of each year, shall employ the equivalent of a full-time county director of school attendance... ."

Garrettson's contract be reduced; he therefore was Textbook Coordinator in the summer.

Grievant contends that he was and is entitled to an extracurricular contract; that under W.Va. Code §18A-4-5a he was and is entitled to the monthly supplement of $110 paid other coordinators by Respondent; and that Respondent, in contravention of the requirements of W.Va. Code §18A-2-7, transferred him without notice from his coordinator duties in Summer 1989. Grievant also contends that he is entitled under the "Wage and Hour Law, Federal Register, Wage and Hour 29 CFR Part 553" for time-and-a-half payment for the 25 and 26 days he worked as Textbook Coordinator during the summers of 1987 and 1988, respectively. Respondent concedes that Grievant works as Textbook Coordinator during the regular school term but denies that he is entitled to any compensation therefor, contending that Grievant volunteered to do the work and that it does not entitle him under W.Va. Code §18A-4-5a to the $110 supplement paid other coordinators.[4]

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[4]Timeliness is an affirmative defense that, unless raised by Respondent, is considered waived. See Hunting v. Lincoln Co. Bd. of Educ., Docket No. 22-88-152 (Nov. 22, 1988). Although the issue was not raised by Respondent, the Level II evaluator ruled that the grievance was untimely. Nevertheless, since no such contention was raised at Level IV, timeliness as a defense will not be considered. See Isaacs v. Lincoln Co. Bd. of Educ., Docket No. 22-88-122, n.6 (Sept. 28, 1988).

Grievant's appointment as Textbook Coordinator during the regular school year is actually not in issue, since Respondent so concedes. Grievant generally argues that he is entitled under the law of contracts to an implied extra-curricular summer contract as Textbook Coordinator.[5] There is nothing to support that he is entitled to an extracurricular contract. The minutes of Respondent's vote to reclassify Grievant as "Homebound Teacher/Textbook Coordinator" rather support that his coordinator duties are covered by his regular contract of employment.

The record fails to establish, furthermore, that Grievant is entitled under W.Va. Code §18A-4-5a[6] to the

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[5]Grievant's argument is less than clear, being in whole,

> Contracts §§49, 62; Restitution and Implied Contracts - §7 - Implied Contracts - Supplementary - Past Usage. As a general rule, the law of contracts provides that agreements, though not formalized in writing, may be implied, that explicit contractual provisions may be supplemented by other agreements implied from the promisor's words and the conduct in the light of the surrounding circumstances, and that the meaning of the promisor's words and acts may be found by relating them to the usage of the past. Charles R. Perry, et al., v. Robert P. Sindermann, etc., 408 US 593, 33 L Ed. 2d 570, 92 S Ct. 2694 (June 29, 1972).

Grievant fails to relate this argument to the facts of this case and does not designate the treatise he relies on. The pertinence of the Perry decision, relating to due process rights of a dismissed nontenured teacher, also is not self-evident.

[6]W.Va. Code §18A-4-5a provides in pertinent part:

> Counties may fix higher salaries for teachers placed in
> (Footnote Continued)

supplemental pay for being Textbook Coordinator. As in Lockhart v. McDowell Co. Bd. of Educ., Docket No. 89-33-362 (Dec. 14, 1989), little detailed evidence was submitted on what are Grievant's duties as Textbook Coordinator[7] and there was no evidence on what other coordinators who receive the $110 supplemental pay do.[8] In fact, the only information provided was a stipulation entered at the Level IV hearing that Grievant "does perform responsibilities as a coordinator that are comparable to the responsibilities of other coordinators who receive $110." While the stipulation is uncontradicted by any evidence of record and is therefore accepted, it is simply too unspecific to fulfill Grievant's burden under Code §18A-4-5a. For example, it may well be that, even though the other coordinators who receive the

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(Footnote Continued)

special instructional assignments, for those assigned to or employed for duties other than regular instructional duties and for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to his regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county.

[7]Grievant testified, "Choosing the textbooks and the kits, I have nothing to do with. I order the books, I receive the books, check the books, stamp the books, distribute the books." Level II Tr. 19.

[8]In rejecting Grievant's nonuniformity contention, the Level II evaluator made extensive factual findings. However, since absolutely no evidence of record supports those findings, they were improperly made.

extra pay have "comparable" duties to Grievant's, they may spend a much greater amount of time carrying out those duties.

While Respondent does not concede that Grievant is entitled to summertime employment as Textbook Coordinator and his appointment as coordinator does not necessarily include such employment, an implication that he was to remain coordinator during the summer arises from the fact that he was allowed to work thereas during Summer 1988. However, while Grievant's argument that removing him from the position would require following the transfer procedures of W.Va. Code §18A-2-7 may be correct, there is nothing on the record establishing that he has been transferred out of the position.[9] Moreover, even if Respondent had improperly transferred the position from him or improperly terminated an implied contract that he remain Textbook Coordinator in the summer, Grievant failed to establish that he would be entitled to relief. Grievant apparently assumes that being Textbook Coordinator necessarily entitles him to work a certain number of days in the summer,[10] but there is nothing in this record or in law that entitles him to work any

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[9]There is nothing in the statute that would prevent Respondent from having two Textbook Coordinators in the summer, as it apparently does.

[10]While Grievant was not clear, apparently his requested relief for not being allowed to work Summer 1989 was payment for 40 days' work because that was the number of days Mr. Garrettson had a contract for.

certain number of days in the summer, or any days at all.[11] He therefore has failed to establish that he is entitled to any compensation for not being allowed to work during the summer 1989.[12]

Grievant's final contention, that he is entitled to further compensatory time of one-half day for each day he worked in the summers of 1987 and 1988, must be rejected. While there is no dispute that the wage and hour provisions of the Federal Labor Standards Act (FLSA) apply and indeed have been incorporated by Respondent's Policy 8-09.00, "Wage and Hour Regulations," Grievant provides no support[13] and none is found for his contention that he is entitled to time

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[11]While Grievant's professional contract was not submitted into the record, it is clear that it is not for year-round employment and presumably is a 200-day contract, as is normal for teachers. Accordingly, if Respondent in the future wishes further services of a Textbook Coordinator in the summer, it may be necessary for it to modify Grievant's regular contract to allow for longer employment or to post a summertime Textbook Coordinator extracurricular position. Of course, if Grievant is required to work as Textbook Coordinator during the summer, he is entitled to compensation.

[12]Grievant argued at Level II that W.Va. Code §18A-4-5a entitles him to summertime work. While no such contention has been clearly made at Level IV, it at any rate is not supported by any evidence of record.

[13]At hearing Grievant's representative was apprised that, if Grievant was relying on the federal law, proper briefing thereon was necessary and that further general references to "29 CFR Part 553," such as made at Level II, would be inadequate. Unfortunately, no further argument or support was provided by Grievant's proposals.

and one-half compensation for that work.[14] The policy provides, consistently with the federal law,

> In defining the forty-hour work week for employees of the Lincoln County Board of Education, there shall be two employee groups. The exempt employee group will mainly be made up of teachers, executives, administrators, supervisors and directors. The non-exempt group of employees will be mainly made up of custodians, drivers, cafeteria workers, mechanics, secretaries, accountants, and maintenance workers. ...
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> As to over-time pay due non-exempt employees, the FLSA does not limit the number of hours that an employee may work, either daily or weekly. The Act requires that overtime pay must be paid at a rate of not less than one and one-half times the non-exempt employee's regular rate of pay for each hour worked in a work week in excess of the maximum hours applicable to the type of employment in which the non-exempt employee is engaged. This usually means overtime for those hours in excess of 40 per week. Of course, over-time payments need not be made to exempt or non-covered workers. Only non-exempt employees are entitled to overtime under the FLSA. ...

Grievant's working extra days in the summer not covered by his contract is not "overtime," for it was not time worked "in excess of the maximum hours applicable to the type of employment in which the non-exempt employee is engaged...usually...hours in excess of 40 per week." Moreover, even if such work were overtime, Grievant has failed to establish that he would be entitled to time-and-a-half payment. Clearly and concededly Grievant's full-time

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[14]This decision rests on consideration of the FLSA only insofar as it is incorporated by Respondent's policy. Since no contention is made based on the FLSA alone, it is not necessary to address whether this Grievance Board has authority to decide cases based not on policy of a board of education but solely on the FLSA.

position as teacher is exempt employment and, even if it were clear that work of a Textbook Coordinator would be non-exempt, which it is not, there is no basis for holding that the addition of non-exempt work to exempt work would entitle the employee to time-and-a-half compensation.[15]

In addition to the determinations made in the foregoing discussion, the following are appropriate:

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his or her complaint 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).

2. Grievant has not established by a preponderance of the evidence that Respondent violated W.Va. Code §18A-4-5a in failing to pay him the monthly supplement paid some other coordinators.

3. Grievant has not established that he was improperly transferred from his duties as Textbook Coordinator or that any implied contract has been improperly terminated.

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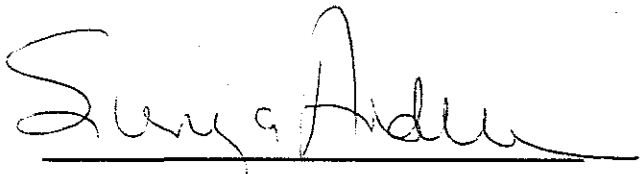
[15]It is also anomalous for Grievant to request time off as a teacher, exempt employment, in payment for work as Textbook Coordinator, allegedly non-exempt employment.

Furthermore, even if there had been such impropriety, Grievant has failed to establish he is entitled to any relief for not being allowed to work as Textbook Coordinator in Summer 1989. Grievant has not established that he is entitled to an extracurricular contract for work as Textbook Coordinator in the summer 1989.

4. Grievant did not establish he is entitled to time-and-a-half payment under the Federal Labor Standards Act, as incorporated by Respondent's Policy 8-09.00, for working as Textbook Coordinator 25 and 26 days during the summers of 1987 and 1988, respectively.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: January 5, 1990