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DAVID ST. CLAIR

v. Docket No. RESA-88-186

RESA-V

D E C I S I O N

Grievant David St. Clair initiated this complaint at level one in mid-June 1988 after he was notified by his then employer, respondent Regional Educational Service Agency V (RESA), that he would not be reemployed for the 1988-89 school year. Adverse decisions on the matter were rendered at levels one through three July 11, August 14 and September 20, 1988, and the grievance was advanced to level four in late September 1988.[1] Hearings were scheduled November 3 and December 6, 1988, but continued for cause shown. A January 3, 1989, hearing was cancelled upon a joint request from the parties that matters be

[1]Grievant's two-page statement of the grievance will not be summarized herein. Simply put, he protested respondent's action not to retain him, among other things, and requested reinstatement as well as other forms of relief.

held in abeyance to allow them more time to prepare stipulations of facts and define the issues of the grievance.

In mid-March 1989, counsel for the parties requested that, instead of a level four hearing, an initial determination be made on the due process issue raised by grievant. The stated rationale was to possibly eliminate the need for further proceedings, depending on the outcome of the due process issue. Said request was granted; thereafter, submissions of stipulations, documentary evidence, briefs and reply briefs were completed by May 23, 1989.[2]

> The parties specified the due process issue as follows:
>
> Whether [grievant] was entitled to any due process protections in regard to federal or state law, rules or regulations of any state department or administrative agency, written policies and procedures of RESA V or that otherwise may be implied by reason of the nature and circumstances of his employment.

Grievant contends that due process protections were applicable to his employment on the basis of state and federal law, state administrative rules and regulations and RESA's written policies and procedures and other customs, practices and conduct. Conversely, RESA maintains that grievant was not covered by the contractual or procedural protections to which he claims entitlement, and that he was afforded all the process due him.

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[2]Agreeing that the stipulations of fact would suffice, the parties did not submit the transcript of the level two hearing. However, numerous marked documents from that proceeding were made part of the level four evidentiary record.

Grievant noted on his final brief, p.19, "If great weight [is given] to the written contract, then the outcome of this case is evident." The contract and other factors which expressly limited grievant's employment with RESA must be given great weight and, for reasons hereinafter discussed, it is determined that the evidence and law fully support RESA's position in this matter.

The stipulations of fact advanced by the parties were directed solely to the due process issue. Those facts, in essence,[3] are as follows:

1. RESA V is a multi-county service agency established pursuant to authority granted unto the West Virginia Board of Education [(WVBE)] by the 1972 Legislature in W.Va. Code §18-2-26.[4]

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[3]Although most of the stipulated material is reproduced faithfully, some passages have been modified or deleted for brevity's sake. For example, references to exhibits were usually excluded, although in some instances the content of a referenced exhibit was added, in whole or part, and at times in a footnote. Further, entries were renumbered for clarity, and the words "Grievant" or "He" were substituted for "Mr. St. Clair." Finally, for ease in reading, the quoted material was not single spaced or indented.

[4]Prior to its amendment effective June 27, 1988, Code §18-2-26 provided as follows:

> In order to consolidate and more effectively administer existing regional education programs and in order to equalize and extend educational opportunities, the state board of education is authorized and empowered to establish multi-county regional educational service agencies for the purpose of providing educational services to the county school systems, and to make such rules and regulations as may be necessary for the effective administration and operation of such agencies.

(Footnote Continued)

2. Grievant was initially employed by RESA V pursuant to a Contract of Employment dated January 21, 1985, [which] covered the employment period of January 18, 1985 through June 30, 1985. He subsequently entered into written Contracts of Employment with RESA V for Fiscal years 1985-86, 1986-87 and 1987-88. Under each of the written contracts of employment he was employed as a Counselor in the JTPA Pre-Employment Drop-Out Prevention (Intervention) Project, "JTPA Drop-Out Prevention Project," administered by RESA V.

3. During the entire period of grievant's employment by RESA V, all other employees of RESA V were employed pursuant to written Contracts of Employment similar in form to that of grievant's contract. In particular, each such contract contained language identical to the fourth paragraph of grievant's contract dated January 21, 1985.

The provision found in the fourth paragraph of the standard contract states:

> This Contract of Employment is not a continuing contract of employment with RESA V, as the Board of Directors of RESA V does not have the power to enter into a continuing contract with any of its employees. The annual salary specified above is determined by the RESA V Board of Directors and salary and employment are contingent upon program continuation, sufficient funding, and approved by the RESA V Board of Directors.

(Footnote Continued)

> A regional board shall be empowered to receive and disperse [sic] funds from the federal government, member counties, gifts and grants.

No mention is made in the statute, as enacted in 1972 or in the 1988 amendment, as to the details of RESA operations, including personnel matters.

Another stipulation in the contract provides that, "[RESA] reserves all rights accruing to it under the laws of the State . . . relating to suspension or dismissal of employees."

4. RESA V Board Policy, Part IV [(RESA Policy §4.000 or §4.000)], was applicable to the employment of grievant and all other employees of RESA V during the year which began July 1, 1987.

RESA Policy §4.000 is entitled "Staff Policies." Among other things, under the heading of §4.030, "Salary Scale," §4.033 states, "Tenure - There shall be no tenure under any RESA V project or program." [5]

5. A letter, Ex.11, was received by grievant on February 26, 1988, concerning his [continued] employment [beyond the fiscal/contract year]. All employees of RESA V at the same time received letters identical in form.[6]

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[5]RESA Policy §4.032 states as follows:

> Continued employment shall be contingent upon: 1) project or program approval for continuation by funding source and the Board of Directors, 2) a sufficient level of funding, 3) acceptable performance of duties, 4) recommendation for employment by the Executive Director, and 5) employment by the RESA V Board of Directors.

§4.031 sets forth a salary range for professional salaries and notes that salaries are dependent on training, experience, expertise and level of project or program funding.

Grievant asserts other policy provisions contained in §4.000 are particularly significant and relevant to the issue herein. Those provisions will be discussed below.

[6]Similar letters were delivered to and received by grievant and all other employees of RESA V prior to July 1, 1986, and July 1, 1987, respectively, Exs.12,13.

The 1988 letter, in memorandum format, abbreviated somewhat, stated:

> Pursuant to State Law, you are hereby notified that employment beyond June 30, 1988, cannot be guaranteed. Beginning July 1, 1988 employment in your present capacity . . . is contingent upon project or program approval for continuation, subsequent adequate funding, acceptable evaluation and RESA['s] approval of employment . . . .
>
> If you are an employee . . . and project funding will terminate as of June 30, 1988, you are hereby informed that your employment will terminate on that date.
>
> Please sign and date receipt of this notice . . . and return to me immediately. Please retain this copy for your records.

6. A letter [containing information about a decrease in JTPA funding and recommending staff terminations] from Assistant State Superintendent of Schools Clarence Burdette dated March 7, 1988, was received by James P. Lydon, Executive Director of RESA V.

7. A memorandum was presented to the Board of Directors of RESA V on June 8, 1988, by Mr. Lydon concerning cutbacks in JTPA funding for Fiscal Year 1988-89 and his proposal for dealing with them. Grievant was not shown or told about this memorandum, or the recommendation thereof concerning the elimination of one counselor's position, until after June 8, 1988.

8. Funding for the JTPA Drop-Out Prevention Project for Fiscal Year 1988-89 suffered a 30 percent cutback from funding levels for Fiscal year 1987-88.

9. The Board of Directors of RESA V met on June 8, 1988, and voted to re-employ for the year beginning July 1, 1988, all but three persons who were then employed by RESA V. Grievant was one of the three employees which the Board did not vote to re-employ for the year beginning July 1, 1988. The other two such employees were employed during Fiscal year 1987-88 under

contracts similar in form to grievant's except that in their contracts the period of employment was described as "as needed."

10. A letter dated June 9, 1988, which was written by James P. Lydon, Executive Director of RESA V, was received by grievant on that date.

The letter contained notice to grievant that, due to the reduction in funding, RESA would retain only certified teachers for the JTPA program and he would not be re-employed for the next year due to lack of need.

11. Grievant's last Contract of Employment with RESA V expired on June 30, 1988, and he was not thereafter employed by RESA V.

12. Grievant was not afforded a hearing by RESA V prior to the June 8, 1988, action of the RESA V Board of Directors. The action of the Board of Directors on June 8, 1988, in approving the recommendations of James P. Lydon regarding staffing for Fiscal Year 1988-89 was taken without prior personal notice to grievant that such action would be taken by the Board at that particular meeting.

13. At the end of Fiscal Year 1987-88, none of the positions for which incumbent RESA V employees were re-employed for Fiscal Year 1988-89 were, prior to said re-employment, advertised as "vacant" or "posted" for the ensuing year, nor were any persons not then employed by RESA V interviewed as candidates for such positions.

14. At a [board] meeting of [RESA's members] at the end of Fiscal Year 1984-85, one incumbent RESA V employee was not re-employed for Fiscal Year 1985-86, and the Board voted to re-employ all other incumbent RESA V employees for the ensuing Fiscal Year. At a meeting of the Board of Directors of RESA V at the end of Fiscal Year 1985-86, three incumbent RESA V employees were employed for only the first three months of Fiscal Year 1986-87, and the Board voted to re-employ all other

incumbent RESA V employees for the ensuing Fiscal Year. At a meeting of the Board of Directors of RESA V at the end of Fiscal year 1986-87, the Board voted to re-employ all incumbent RESA V employees for Fiscal Year 1987-88.

15. At the end of Fiscal Years 1984-85, 1985-86 and 1986-87, and with the exception of the position of the employee who was not re-employed at the end of Fiscal Year 1984-85, none of the positions for which incumbent RESA V employees were re-employed for Fiscal Years 1985-86, 1986-87 and 1987-88 were, prior to said re-employment, advertised as "vacant" or "posted" for the ensuing year, nor were any persons not then employed by RESA V interviewed as candidates for such positions.

16. Had grievant been afforded a hearing before [RESA] took the action [of June 8, 1988], he would have tried to convince the Board that he was more qualified to work in the JTPA Drop-Out Prevention Project than other RESA V employees who held teaching certificates and who were re-employed for Fiscal Year 1988-89 to work in the JTPA program or that the non-renewal of his employment contract was not otherwise justified by reason of the cutback in funds.

Discussion

While the grievant did not carry his burden of proof in this matter, his initial statements about federal and state due process standards are deemed correct. He first focused on two specific situations in which non-tenured personnel subject to one-year contracts did not have their contracts renewed. Citing Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2694 (1972), grievant acknowledged that the Court found no property interest existed because the terms of Roth's employment provided for termination on a certain date and contract renewal was not specified. Further, no state statutes or university

rules or policies secured an interest in reemployment or created a legitimate right to it. He agreed that the Roth decision appeared contrary to his own position but declared other "language" found in it had bearing herein.[7]

Grievant then cited Perry v. Sindermann, 408 U.S. 593, 602-603, 33 L.Ed2d 570, 92 S.Ct. 2694 (1972), and declared that the United States Supreme Court modified the "apparently restrictive" Roth rule concerning property interests in one-year employment contracts. He noted that in Sindermann "[i]t has been expressly recognized that the policies and practices of an institution may give rise to a legitimate claim of entitlement to a property right." Hence, he argued, "under federal law, an employee working under a one-year contract may have a sufficient property interest in re-employment to trigger federal procedural due process protections which the employer must recognize and provide to the employee prior to the non-renewal of the contract."[8] Grievant urged that he does not seek tenure as was the case in both Roth and Sindermann, but rather the procedural due

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[7]Grievant excerpted passages from Roth, presumably for the propositions that a person must have a legitimate claim of entitlement to a benefit, not just a unilateral expectation, before a property interest arises requiring procedural due process protections, and that such property interests are not created by the Constitution but can flow from an independent source such as state laws and existing rules or understandings supporting claims of entitlement to those benefits.

[8]RESA analyzed the Roth and Sindermann cases in a similar fashion.

process to which he was entitled, i.e., notice and a hearing on the matter of his contract's non-renewal.

Grievant cited several cases of the West Virginia Supreme Court of Appeals and one in particular for the proposition that "[t]he provisions of the [State] Constitution may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Queen v. W.Va. University Hospitals, 365 S.E.2d 375,377 (1987). Grievant stated that in Queen the Court "addressed the due process protections for nontenured, non-civil service employees whose employment is affected by state action." Grievant made no other contentions about Queen, but especially noted that, unlike appellee Queen who was notified in advance of the circumstances leading to his discharge, he had not been notified that his contract was not going to be renewed and was not told until after the decision had been made.

Grievant's observation about Queen was presumably an attempt to analogize and somehow deem significant the circumstances of Mr. Queen's termination of employment with an entity deemed a state actor and his own situation with RESA, also undeniably a state actor. However, with respect to public employment, RESA more reasonably stated that "in a proper case, the due process provisions of the federal and state constitutions may afford a hearing, but only if the employee has been deprived of a 'protected interest.'"

Mr. Queen was discharged from his continuous employment for disciplinary factors and circumstances vastly different from those which precipitated grievant's non-retention with RESA. In

short, Mr. Queen was fired and the grievant was not. Grievant's employment was clearly limited by the terms of his yearly contract and other of RESA's written policies, and his non-retention was predicated on funding deficiencies and lack of need, factors reasonably made known to him when he signed his yearly contract and received his annual letter informing him again of those limits on employment beyond the current fiscal year and contract term. In light of those express limits, grievant herein has not shown a protected interest in continued employment solely on the basis that he was employed by a state entity.

Grievant's arguments that RESA's written policies and procedures provide due process in employment matters and also other bases upon which its employees can expect continued employment, despite the one-year contracts, likewise were not compelling. For example, he first asserted that the West Virginia Board of Education Policy No. 5300 (WVBE Policy 5300 or Policy 5300) provides due process protections for employees of the West Virginia Department of Education (WVDE) as determined in State ex rel. Wilson v. Truby, 281 S.E.2d 231 (W.Va. 1981). While noting that it seemed evident prior to 1981 that Policy 5300 covered only county board of education employees, the grievant claimed that, since "RESA's are creatures of [WVDE], then Policy 5300 would be applicable to RESA employees under a fair reading of Truby." More telling, he claimed, RESA incorporated into §4.090, "Evaluation of Service," the following language from Policy 5300: "It is recognized that every

employee is entitled to due process in matters affecting his/her employment, transfer, demotion or promotion."[9]

RESA correctly countered that Truby did not stand for the proposition advanced by grievant. Despite an extended discussion of Policy 5300, the Truby Court did not rule on the Policy 5300 issue, i.e., that it covered any personnel other than county board of education employees. The Court instead determined that WVDE was bound by the procedures it established, and

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[9]Relevant portions of RESA Policy §4.090 are as follows:

I. INTENT

West Virginia Board of Education Policy 5300 provides that:

> "Every employee is entitled to know how well he/she is performing his/her job and should be offered the opportunity of an open and honest evaluation of his/her performance on a regular basis...Every employee is entitled to the opportunity of improving his/her job performance prior to terminating or transferring of his/her services and can only do so with the assistance of regular evaluation. It is recognized that every employee is entitled to due process in matters affecting his/her employment, transfer, demotion or promotion."

Therefore, a standardized evaluation system for all personnel is established by the Regional Education Service Agency V (RESA V) Board of Directors.

III. RESPONSIBILITIES

The state board of education has developed and requires the use of standardized evaluation components by local education agencies in implementing their evaluation policies and procedures (WV Board Policy 5310-5315). The RESA V Board of Directors does hereby comply with such personnel evaluation requirements as set forth by the state board of education.

IV. COMPONENTS/B. DEFINITION

12. A beginning employee of RESA starts on probation and is helped to achieve non-probationary status

(Footnote Continued)

the petitioner-applicant was entitled to an interview in accord with WVDE's employees' handbook which provided for such.

Further, in this instance, it makes little difference whether RESA Policy §4.090 incorporated Policy 5300 language. County boards of education have also adopted much of Policy 5300's language, but those entities are bound first by WVBE's policy, see Brown v. Wood Co. Bd. of Educ., Docket No. 54-87-221-3 (Mar. 1, 1988), while RESA is not. WVBE Policy 5300 is applicable when a county board of education contemplates adverse personnel action in a disciplinary context:

> Failure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300(6)(a) prohibits such board from discharging, demoting, or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.

Syl. pt. 3, Trimboli v. Board of Education of the County of Wayne, 254 S.E.2d 561 (W.Va. 1979). RESA employees are not employees of a county board of education.

While RESA parroted a small portion of the Policy 5300 language in its "intent" section of Policy §4.090, it certainly did not explicitly adopt WVBE's policy but instead sought to define an evaluation process for RESA personnel. The section is expressly titled "Evaluation of Service" and, like Policy 5300,

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(Footnote Continued)
through the first three years of employment. However, an employee may achieve non-probationary status at the end of one successful year of employment if they have attained tenure in another county in West Virginia.

serves in part to facilitate quality educational standards and to protect employees from arbitrary charges of incompetence and unwarranted, adverse personnel actions.[10] Since grievant's contract of employment was issued on a year-to-year basis and clearly disclaimed itself as a continuing contract, any procedural due process protection from personnel actions afforded by RESA's Policy §4.090 was clearly limited to the one-year period of employment. Hence, Policy §4.090 did not apply in this case because grievant's year-to-year contract expired, and his non-retention was not a dismissal or termination based on disciplinary or competency factors or any such event which would trigger the scrutiny of evaluative data in consideration of adverse personnel action during the employment term. Therefore neither WVBE Policy 5300 nor RESA Policy §4.090 can be construed as a basis upon which grievant can secure a property interest in employment beyond the contracted-for term.

Perhaps recognizing the tenuous ground upon which this due process argument was planted, grievant also relied on the protections of W.Va. Code §18A-2-2. Among other things, the statute mandates that notice and hearing be afforded to professional employees of county boards of education who have attained continuing contract status but whose termination for lack of need is contemplated. See State ex rel. Bd. of Educ. v Casey,

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[10]WVBE Policy 5300 is not applicable for Reduction-in-Force proceedings utilized by county boards of education to terminate personnel due to lack of need or for administrative transfers when personnel are realigned.

349 S.E.2d 436 (W.Va. 1986). Grievant initially disclaimed that the termination of his employment was directly applicable to Code §18A-2-2, but later argued that RESA's practices bound it to the provisions of the statute, citing the first phrase of the opening sentence of Mr. Lydon's February 26, 1988, letter to him which stated, "Pursuant to State Law, you are hereby notified that employment beyond June 30, 1988, cannot be guaranteed." He then urged that the phrase must refer either to WVBE Policy 5300 or to W.Va. Code §18A-2-2. He concluded that RESA's executive director believed he had "some obligation under state law to notify employees of possible non-renewal of their employment contracts."

In short, the language of the statute limits it to a specific group of employees, i.e., professional personnel employed by a county board of education. Moreover, RESA's view on the matter is persuasive. It responded that the ambiguous "pursuant to state law" phrase written by its Executive Director was perhaps an inartful use of words to reference other pertinent matters such as policy outlining the Director's authority or statutes addressing fiscal matters of a public body. In any event, RESA contended, the phrase's "four vague words . . . cannot reasonably be construed as an official policy of RESA, as a mutually explicit understanding of continued employment, or as language upon which anyone could 'legitimately' rely to establish tenure." It is not reasonable to conclude that the letter bound RESA to a statute pertaining exclusively to professional employees of county boards of education. Whatever the contested

words meant, they cannot emasculate RESA's explicit contractual employment term.

Grievant also relied on RESA's operating policy for annual and sick leave for its professional and non-professional staff. Policy §4.021 provides two days' annual leave per each month of employment for professional employees which may be accumulated to the maximum of thirty days. Section 4.024 affords non-professional first-year staff one-half day annual leave per month. In succeeding years of continuous employment, more days or portions thereof are accumulated per month. These policy entitlements give rise to an expectation of continued employment, claimed grievant, since leave time does not have to be forfeited at the end of a given employment year but may be carried over to succeeding years, and the policy clearly anticipates continued employment.

It cannot be disputed that RESA probably desired, for the most part, to provide continuity in programming and employment. Also true is that RESA, through its policies and practices, sought to grant its employees benefits of employment which paralleled those of other state entities and county boards of education, even to the point that after three years an employee gained a "non-probationary" status. However, no special significance can be accorded RESA's desires for continuity or its leave policies. Those practices must be viewed in the context of the limited employment RESA offered, always subject to financial restraints, and do not create the property interest in continued employment that grievant understandably desires.

Nothing in the language of §§4.021, 4.024 can be construed as an explicit promise of continued employment simply because those sections advise employees of leave matters when employment does continue in some desired fashion beyond one twelve-month term of employment. Moreover, as RESA contended, most employers have some type of leave policy in place for staff. Section 4.090(IV)(B)(12) simply facilitates the passage of a tenured employee of a board of education to a non-probationary status with RESA after one year's service instead of a required three-year probationary status for freshman RESA employees, see N. 9. §§4.021, 4.024, 4.090 cannot be given more import than §4.030 which restates the provision found in grievant's contract, i.e., that "there shall be no tenure under any RESA V project or program."

Grievant's employment status is very similar to that of the state college administrator in State ex rel. Tuck v. Cole, 386 S.E.2d 835, 838 (W.Va. 1989), who was found not to have any property right in continued employment and, therefore, "had no right to a hearing before the respondents let him go." The explicit circumstances of the grievant's employment do not create a protected property interest because tenure was not possible and his contract expired of its own terms, factors of which he was fully apprised. The term of his employment was governed first and foremost by his contract and RESA's clearly stated position that it could not grant continuing employment because of the nature of funding for RESA's endeavors and other legally limiting factors. As policy and practice, RESA

constantly reminded grievant of its inability to extend employment on more than a year-to-year basis, according to funding. Therefore, RESA's not granting grievant a hearing prior to the non-renewal of his contract did not deprive him of property without due process. Roth; Tuck.

In addition to the foregoing factual stipulations and determinations, the following factual and legal specifics are appropriate.

FINDINGS OF FACT

1. Prior to June 30, 1988, Grievant had been employed by RESA for several years as a non-certified counselor in a drop-out prevention program on a year-to-year basis, as per the terms of his contract.

2. At all times during his employment with RESA, grievant was regularly and routinely notified of the limited scope of his employment tenure due to preexisting limitations imposed on RESA, including basic funding and program considerations.

3. Due to a cutback in funding and reassessment of program needs, RESA concluded it would not reemploy non-certified counselors for its drop-out prevention program during the 1988-89 contract year.

4. After RESA's June 1988 action on grievant's non-retention, it notified grievant that his contract would not be renewed for the 1988-89 fiscal year beginning July 1, 1988.

CONCLUSIONS OF LAW

1. A grievant must prove the allegations of his or her complaint by a preponderance of the evidence. Bonnell v. W.Va. Department of Corrections, Docket No. 89-CORR-163 (Mar. 8, 1990); Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A "property interest" includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. Waite v. Civil Service Comm., 241 S.E.2d 164 (W.Va. 1977).

3. The various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county board of education employees do not apply to employees of the several state Regional Education Services Agencies. Sark/Douglas v. RESA IV, Docket No. 89-RESA-131 (Aug. 30, 1989).

4. Grievant did not establish that he had a right to another one-year contract under any statute, regulation, contract or "mutually explicit understanding," and he had at best a unilateral expectation of continued employment. Therefore, he was not entitled under the federal or state constitutions to a hearing prior to RESA's decision not to renew his year-to-year contract for the 1988-89 fiscal year. See State ex rel. Tuck v. Cole, 386 S.E.2d 835 (W.Va. 1989).

Accordingly, the grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: **April 27, 1990**

NEDRA KOVAL
Hearing Examiner