JACQUELINE L. HUFF

v. Docket No. 93-25-490

MARSHALL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, currently employed by Respondent Marshall County Board of Education (MCBE) as a music teacher, filed the follow ing complaint at level four: (See footnote 1)

The problem is that I am being asked to repay monies to the Marshall Co. Schools because Marshall Co. Schools does not consider me as currently being a choral director, and according to them have overpaid me.

I still am a choral director at the elementary level because I do teach 5th - 6th grade chorus, direct plays, and students at other after school functions. Therefore, I feel I should not have to repay the monies because I am currently a choral director and should be paid uniformly to other choral directors in the county.

The parties do not dispute the underlying facts which gave rise to this grievance. Simply put, Grievant received her regular teaching salary and a $900 annual supplement for the two years she served as a high school music teacher and choral director. Beginning the 1991-92 school year, Grievant assumed an elementary music teaching position which does not carry the additional title of choral director. MCBE continued to pay Grievant the yearly supplement until shortly after the beginning of the 1993-94 school year. At that point school officials informed Grievant she would no longer receive the choral direc tor's supplement and that she had to make arrangements to repay all amounts mistakenly paid during her entire two-year-plus tenure as an elementary teacher.

Grievant insists that she serves as a choral director in her present teaching capacity at the elementary school level. For that reason, she argues, she is entitled to receive the $900 annual increment in conjunction with her elementary music teaching duties and to keep the funds already disbursed by MCBE in the two prior school years. According to Grievant, she devotes about twenty-nine hours per year beyond her regularly- scheduled work days to perform music-related activities in herpresent position. These activities include making practice tapes, preparing a director's score, previewing music, writing student programs, and attending student performances. Grievant estimated that, in contrast, she devoted only thirteen hours outside the work day to her duties at CHS.

In her level four brief, Grievant argues that the choral director work she performed on the high school level was tanta mount to "a verbal extracurricular contract made between her and [MCBE] and . . . controlled by [W.Va Code §18A-4-16.]" She maintains the contract still exists because MCBE did not follow statutory procedural requirements to "resolve" that contract. (See footnote 2) She also insists that because the "extracurricular activities" she performs at the elementary school level are comparable to those of a high school choral director, she should be paid in a uniform manner in accordance with Code §18A-4-5a. Presumably, the relief sought is reinstatement of the supplement and an order barring MCBE from taking any action to recover the $1800 already paid.

MCBE argues that Grievant has not demonstrated any statuto ry violations or otherwise proved her case. It maintains neither Grievant's contract of employment nor any extracurricu lar contract entitled her to receive the $900 increment once sheleft the position of choral director at CHS and assumed the position of elementary music teacher because MCBE does not have a policy regarding the hiring or compensation of elementary music choral directors. In addition, MCBE cites Weimer-Godwin v. Bd. of Ed. of Upshur County, 369 S.E.2d 726, 730 (W.Va. 1988), and proposes as follows: A county board of education is not authorized to pay additional compensation to teachers for regular instructional duties, regardless of when they occur. Also, a school board is not required to pay additional compensation to teachers who perform non-instructional duties outside the scheduled hours of the regular school day.

MCBE also maintains that

Under W.Va. Code §11-8-26, a board of education may not expend money for an unauthorized purpose. If it does so, suit may be instituted under W.Va. Code §11- 8-28 to recover the money expended. The legislative intent is that money unlawfully paid by a fiscal body must be recovered. See Bd. of Educ. v. Commerce Cas. Ins. Co., 116 W.Va. 503, 182 S.E. 87 (1935); County Court v. Carpenter, 115 W.Va. 51, 174 S.E. 568 (1934). All who deal with a board of education are charged with notice of the scope of its authority. Honaker v. Bd. of Educ., 42 W.Va. 170, 24 S.E. 544 (1896).

Finally, MCBE urges that Grievant "has also failed to prove by a preponderance of the evidence that the payments were not, as [MCBE] has asserted, a mistake."

Many of the parties' arguments in this case need not be discussed in detail or even reached. The underlying issue in this case is simply whether Grievant's job as an elementary music teacher

includes any formally established duties as a choral director. In other words, in order to justify the payment of a choral director's supplement, the burden is upon Grievant to establish she had been assigned to complete certaintasks or to attend after-school activities in conjunction with or in addition to her duties as an elementary music teacher. The evidence demonstrates that Grievant performed after-school chores voluntarily.

At hearing, Grievant agreed that she had not been instruct ed to perform duties beyond the regular work day, but that she performed the after-hours duties because she "figured" she should do so and because she got the impression from the elemen tary teachers that she "needed to" help with student plays. (See footnote 3) Grievant simply has not established that she is entitled to the continued payment of a choral director's salary supplement. Therefore, MCBE is not obligated to resume payments.

It follows that Grievant was overpaid by $1800 in the two past school years. However, the undersigned declines to reach the question of repayment. First of all, MCBE had taken no action to recover the money from Grievant at the time of the level four hearing, so repayment from Grievant was a non-issue at that time.

In addition, the Grievance Board has no authority to prevent MCBE from seeking relief on the question of repayment in a court of competent jurisdiction. Interestingly enough, while MCBE quoted W.Va. Code §§11-8-26 and 11-8-28 as support for its position that it could recover money spent for an unauthorizedpurpose, presumably from Grievant, it completely neglected to also cite and quote §11-8-29:

A person who in his official capacity negligently participates in the violation of either. . .[§11-8-25 or §11-8-26]. . .shall be personally liable, jointly and severally, for the amount illegally expended.

Grievant does not have the burden of proving in this action that MCBE's "past payments were not, as [MCBE] has asserted, a mis take." What is important in this case is that the overpayment occurred in the first place and continued for as long as it did, seemingly due to negligent actions on the part of MCBE, and not due to actions on the part of Grievant such as misrepresenting her status to MCBE's administrators or school officials. (See footnote 4)

In addition to the foregoing, the following formal findings and conclusions are made.

Findings of Fact

1. MCBE initially employed Grievant for the position of high school music teacher and choral

director at Cameron High School (CHS). She held this position for school years 1989-90 and 1990-91.

2. During her tenure at CHS, Grievant received her regular teaching salary and a $900 yearly supplement relative to her position as choral director at the high school.

3. In 1991, Grievant applied and was selected for her present position as an elementary music teacher at two elementary schools, a position which does not include the title of choral director. Grievant started that position at the begin ning of the 1991-92 school year.

4. While teaching elementary school music, Grievant voluntarily devoted after-school time to assist with seasonal plays and to perform other music-related functions. Grievant did not specify whether these tasks, making practice tapes, preparing a director's score, previewing music, writing student programs, and attending student performances, were "instruction al" or "noninstructional" in nature.

5. MCBE continued to pay Grievant the $900 annual incre ment after she left CHS and assumed the elementary music teach ing position.

6. In October 1993, MCBE administrators advised Grievant in writing that she should not have received the $900 annual increment after she left CHS because she no longer held the position of high school choral director and that she had been overpaid during her entire tenure as an elementary music teach er. She was advised that her present salary would be adjusted for the remainder of the 1993-94 school year to eliminate payments of the supplement and to recover a portion of the supplement, $112.50, already paid during the present school year.

7. Grievant was also asked to make arrangements to repay the $1800 which MCBE paid her during the 1991-92 and 1992-93 school years, by way of a lump sum or by payroll deductions.

8. Grievant revealed at the level four hearing that the1993-94 supplementary payment of $112.50 was now totally recap tured by MCBE. She said all remaining amounts had been deducted in one lump sum at the time she qualified for a salary increase due to her movement from "AB" to "AB plus fifteen" on the teachers' salary scale.

9. At the time of the level four hearing, Grievant had not complied with MCBE's request to repay the $1800, and MCBE had not initiated any formal proceedings to recover $1800 from Grievant.

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Blankenship v. McDowell County Bd. of Educ., Docket No. 92-33-220 (Apr. 23, 1993); Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W.Va. Code §18A-4-5a does not require that additional compensation be paid a teacher "for either (1) regular instruc tional duties, occurring anytime, or (2) noninstructional duties occurring during regular school hours." Weimer-Godwin v. Bd. of Educ. of Upshur County, 369 S.E.2d 726, 730 (W.Va. 1988).

3. Neither Grievant's contract of employment nor any extracurricular contract entitled her to receive a $900 choral director's salary supplement once she left the position of high school music teacher and choral director and assumed the posi tion of elementary music teacher.

4. MCBE did not order or require Grievant to performafter-school duties or activities, either instructional or noninstructional, in conjunction with her elementary music teaching position.

5. Under most circumstances, an employee cannot voluntar ily assume duties not formally assigned and then expect extra payment from her employer. See generally Eastham v. Tyler County Bd. of Educ., Docket No. 91-48-519 (June 30, 1992); Wear v. West Liberty State College, Docket No. BOR-88-159 (Apr. 30, 1992); Hysel v. Mason County Bd. of Educ., Docket No. 26-86-159- 1 (June 1, 1987).

6. Grievant failed to prove by a preponderance of the evidence that she is entitled to receive a $900 annual salary supplement in conjunction with her duties as an elementary music teacher.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: May 25, 1994

Footnote: 1 Adverse decisions were rendered at levels one and two on October 26, and November 17, 1993, respectively. The grievance was appealed to level four on November 29, 1993 where hearing was held on January 27, 1994. The parties agreed that the record could remain open to allow Grievant an opportunity to tender specified additional evidence. This material was submitted on March 29, 1994. Post-hearing fact/law proposals were filed on May 19, 1994.

Footnote: 2 This argument has no merit. According to MCBE, extracurricular contracts under W.Va. Code §18A-4-16 are not awarded to high school vocal teachers and choral directors; rather, those employees are given a salary increment or supplement. Moreover, the required duties of a high school choral director are outlined in a specific job description. Grievant was not involuntarily transferred to her present position. She bid on an elementary music teaching position and now works under an entirely different job description than that of a high school music teacher and choral director.

Footnote: 3 That Grievant may have some curricular work to perform at home occasionally is not especially remarkable or extraordinary. Most elementary teachers discover that their work day does not always end when the school bell rings and the students depart. As MCBE pointed out, many elementary teachers must complete curricular work such as planning, grading and preparation at home on occasion. This occurs dispite the fact that all teachers, including Grievant, are given an in-school planning period.

Footnote: 4 Nothing in this Decision would preclude MCBE from instituting some sort of small salary supplement for elementary music teachers and requiring that those teachers perform noninstructional support duties outside the scheduled hours of the regular school day.