DARRELL K. WELLS, Sr.,

Grievant,

v. **Docket No. 94-20-149**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Darrell K. Wells, Sr., was employed by Respondent, Kanawha County Board of Education, as one of three adult education instructors in the truck driving program at the Ben Franklin Career Center. He filed his grievance on March 11, 1994, in essence alleging a breach of his employment contract with Respondent, and requesting reinstatement and lost wages pursuant to the written contract between the parties. The grievance was denied at Level II on April 12, 1994, waived at Level III, and proceeded to hearing at Level IV on May 31, 1994. Grievant submitted a post-hearing brief on July 1, 1994. Respondent adopted the findings and conclusions set forth in the Level II decision.

The basic facts are not in dispute. Prior to his employment with Respondent, Grievant was a truck driving instructor with the Boone County Board of Education. Southwest Motor Freight, a private trucking firm, hired former students from the Boone Countytruck driving program and was pleased with their education. Southwest Motor Freight entered into an agreement with Respondent to sponsor a truck driving class at Ben Franklin Career Center. Southwest incurred all the expense of the program and provided all materials. Grievant's Exhibit 5. Grievant's supervisor in Boone County, Ronnie Walker, was specifically requested by Southwest to supervise the program at the Ben Franklin Career Center. Mr. Walker asked Grievant and another instructor at the Boone County program to join the program at the Ben Franklin Career Center. Grievant agreed and entered into a contract with Respondent as an adult education instructor pursuant to W. Va. Code § 18-5-19b on October 25, 1993.

The contract provides for an hourly wage of ten ($10) dollars per hour, a starting date of October

25, 1993, an ending date of June 30, 1994, and a provision allowing either party to terminate the contract with thirty days' written notice. Grievant's Exhibit 4. There is no provision stipulating a maximum or minimum number of hours to be worked in a week, day, or year.

The first class at Ben Franklin Career Center began on November 8, 1993. The first group of students completed the program as scheduled on December 3, 1993. Grievant was told the next class would begin sometime after January 1, 1994. He later learned that on December 22, 1993, Southwest Motor Freight removed its equipment from the Ben Franklin Career Center and terminated the program.

In February 1994, Southwest decided to resume the program and put its equipment back at the Career Center. Southwest told Respondent it was not satisfied with the instruction of the first class. Respondent posted a position for a truck driving instructor on February 7, 1994, and Grievant bid on the job. Grievant's Exhibit 2. He was interviewed but did not receive the position. Respondent hired three new instructors and the second class began on April 15, 1994.

Grievant was notified by Respondent by letter dated April 8, 1994 that his contract was being terminated pursuant to the terms of the contract allowing for either party to terminate the contract with thirty days written notice. This letter effectively termina-ted the contract on May 8, 1994. Grievant's Exhibit 3.

Discussion

Grievant seeks reinstatement of his position and lost wages pursuant to the written contract between the parties. Specifically, he asks for damages from December 22, 1993 to May 11, 1994 in the amount of $9,266.66. Because Respondent properly terminated Grievant's contract according to the terms contained therein, Grievant is not entitled to reinstatement to his position. Respondent argues Grievant is not entitled to compensation for the hours he would have worked teaching the second class until his contract terminated, because the contract does not guarantee any number of hours, and Grievant was hired on an as-needed basis. Respondent claims the instructors hired in February are simply additional instructors, not replacements, and that Grievant couldhave been called in to work anytime until his contract expired on May 8 if additional instructors were needed. There is nothing in the contract which supports Respondent's position.

The truck driving program was terminated after four weeks. Grievant was informed the program

was going to be postponed until after January 1, 1994. Only later did Grievant learn the program had been terminated by Southwest on December 22, 1994. Respondent did not inform him that his services were no longer needed at that time.

Southwest resumed the program in February 1994 and an instructor position was posted. Grievant applied for the position. There was no testimony that Respondent explained to Grievant at this time that his services were no longer needed, or that he could be called to work at any time and that he had only been hired on an as-needed basis.

Respondent made a conscious effort to replace Grievant after discussions with Southwest. (See footnote 1) Three new instructors were hired on contracts with the earliest starting date of March 9, 1994. Respondent knew at that time Grievant would not be teaching the second class beginning on April 15, 1994. Still, Respondent did not notify Grievant that his services were no longer needed and that his contract was being terminated.

Until Grievant was finally notified by Respondent on April 8, 1994 that his contract was being terminated, he was under contract with Respondent to teach the truck driving program at Ben Franklin Career Center. Respondent has offered no rational explanation for not terminating Grievant's contract earlier when it knew that he would not be teaching anymore truck driving classes at Ben Franklin.

The primary objective of contract damages is to put the nonbreaching party in the same position that he would have been in had the contract been performed. Grievant is entitled to compensation for the hours he would have worked until his contract terminated on May 8, 1994. Grievant requests compensation from December 22, 1993 until May 11, 1994 in the amount of $9,266.66. It is unclear how Grievant arrived at this number. However, Grievant had completed instruction of the first class on December 3, 1993. The second class did not begin until April 15, 1993. There is no evidence that there was any work performed by the new instructors prior to that time. Therefore, Grievant is entitled to compensation at the rate of ten ($10) dollars an hour for ten (10) hours a day for every day the new instructors worked from April 15, 1994 until the effective date of his termination, May 8, 1994.

Grievant also requests compensation for 20.75 hours of work for which he was not paid during his instruction of the first class. On November 17, 1993, while taking students to Maysville, Kentucky, Grievant worked 17 hours and was paid for only 10 hours. On November 29, 1993, Grievant took students to Dayton, Ohio andworked 15.5 hours and again was paid for only 10 hours. On November

30, 1993, Grievant spent 12.5 hours in the classroom, doing pre-trip inspections and classroom instruction. He was paid for only 10 hours. On December 2, 1993, he worked 13.75 hours while the students took a Commercial Drivers' License test, and was paid for only 10 hours. Lastly, he spent 12 hours taking students to Cambridge, Ohio, for a Commercial Drivers' License test on December 3, 1993, and was paid for only 10 hours.

Respondent first raises the defense of timeliness with regard to the 20.75 hours worked without pay. Respondent argues the claim was not included in the original grievance filed by the grievant and was first raised at the Level IV hearing. Respondent argues Grievant should have formally amended his complaint to include that claim if he wanted to claim those hours, and that it was never put on notice of this claim. Consequently, the issue of the 20.75 hours should be considered a new grievance, which would then be untimely as Grievant knew he was not paid those hours in December, 1993.

The final level of the grievance procedure where alteration of the substance of a grievance under W. Va. Code § 29-6A-3(j) can occur is at Level III. W. Va. Dept. of Health and Human Services v. Hess, et al., 432 S.E.2d 27 (W. Va. 1993). Grievant testified that he worked those hours and was never paid for them at the Level II hearing. Respondent's counsel did not raise any objection to the presentation of this evidence and, in fact, cross-examined Grievant concerning that issue at Level II. Level II Trans., pp.41, 48-53. The grievance evaluator in the Level II decision did not make any ruling with regard to whether the evidence of the unpaid 20.75 hours constituted a new grievance. The issue presented is whether the claim for the 20.75 hours constitutes a new grievance under W. Va. Code § 29-6A-3(j).

The original grievance asked as relief "[t]o continue my employment as a driver trainer with Ben Franklin Career Center or be paid from the time the school reopens until my contract expires." The appeal to Level IV asks for "reinstatement of [Grievant's] position and lost wages pursuant to the written contract between the parties." In both instances, Grievant is asking that the contract be honored. At Level II, Grievant expanded his request for relief to include the 20.75 hours for which he was not paid. As the original grievance stems from a breach in the terms of the contract, and the request to be paid for the 20.75 hours also stems from the terms of the contract, it is apparent that the issue of the 20.75 hours is simply a change in the relief sought and not a new grievance. Consequently, under

W. Va. Code § 29-6A-3(k), the undersigned can and does hereby allow the Grievant to change the relief sought. The issue can thus be properly ruled upon at Level IV.

Respondent next argues Grievant is not entitled to compensation for these 20.75 hours because of an oral agreement which anticipated payment for a maximum of 10 hours a day, 50 hours a week. The 20.75 hours were in excess of that requirement. The testimony at the Level IV hearing established that there was anoral agreement, however, the meaning of that agreement is in dispute.

Ronnie Walker, Grievant's supervisor, testified that Southwest required a certain amount of instructional time for each student, and calculated that a 50-hour work week was the minimum needed to satisfy those requirements. Mr. Al Brown, the principal of the Career Center testified the 50-hour work week was the maximum number of hours to be worked and that Respondent did not pay overtime. Mr. Brown testified that the budgeted amount for instructors' salaries was based upon 10 hours a day, 50 hours a week.

Grievant's testimony shows he understood the agreement to be a minimum number of hours to be worked. Grievant testified that he often exceeded those hours on orders given to him by his superiors. Grievant testified he took students on a required trip to Dayton, Ohio, and transported a load of cargo to Maysville, Kentucky, also accompanied by students, on orders of his superiors. It is likely Grievant's supervisors realized these trips would exceed the 10-hour day agreement. These trips extended Grievant's work days to 16 and 17 hours.

The oral agreement regarding the 50-hour work week is vague and ambiguous, and there clearly was not a mutual understanding of its meaning. Grievant understood this number to be a minimum, or at the very least, a guideline of hours to work in a week. Respondent claims it was meant to be the maximum number of hours to work. To illustrate just how unclear this "agreement" was, at onepoint during the Level IV hearing, Respondent's attorney, in cross-examining Grievant, pointed to language in the contract which states "[n]o verbal agreements or understandings shall be honored" and argued that Grievant could not rely on any oral agreements to justify being paid for the 20.75 hours. Respondent later relied on the same oral agreement to explain why Grievant should not be paid for those hours.

Looking at the four corners of the contract, it specifically states that no verbal understandings or agreements shall be honored. A written contract may be modified or its terms altered by subsequent valid oral agreement, but only if the subsequent contract is based upon a valuable consideration.

Wilkinson v. Searls, 184 S.E.2d 735 (W. Va. 1971). No evidence was presented that additional consideration was given Grievant for this "oral agreement", nor that both parties clearly understood the meaning of that agreement. The burden of proving oral modification of a written contract is on the party seeking to establish the modification, and that party must demonstrate by clear and positive evidence that the minds of the parties definitely met on the alteration. Combs v. McLynn, 419 S.E.2d 903 (W. Va. 1992). Respondent has not proven an oral modification of the written contract. Therefore, the oral agreement regarding the 50-hour work week is not binding upon the parties, and the exact terms of the contract govern the rights of the parties.

A contract should include any specific conditions upon which the employment is premised. See State ex rel. Hawkins v. TylerCounty Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980). If Respondent wanted to limit the number of hours the driving instructors were to work, it should have included that limitation in the contract. Instead, the contract only references the beginning and ending dates of employment, and that Grievant will be compensated at a rate of $10.00 an hour. Therefore, Grievant is entitled to be paid at the rate of $10.00 an hour for every hour he worked for Respondent, including the 20.75 hours for which he was not paid.

In addition to the foregoing facts, the following conclusions of law are made.

Conclusions of Law

1. An issue must be substantially different from the pending matter, and not addressed at a lower level, to be remanded back to a lower level for consideration. Olsen v. Hampshire County Bd. of Educ., Docket No. 14-87-288-2 (May 19, 1988). The issue of the unpaid 20.75 hours raised at Level II, arises from the same breach of contract which is the subject of the original grievance. The request to be paid for those hours is simply a change in the relief sought, not a new grievance, and thus, can be properly ruled upon at Level IV. See W. Va. Dept. of Health and Human Services v. Hess, et al., 432 S.E.2d 27 (W. Va. 1993).

2. Respondent was clearly within its rights under the terms of the contract to terminate the contract at any time, with 30 days notice. However, as early as March 9, 1994, Respondent knew Grievant would be replaced in the spring class of the program. In order to prevail, Grievant must establish the truth of hisallegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989). Grievant has proved that Respondent breached his

contract when it hired three new instructors for his position while he was still under contract with Respondent.

Accordingly, this grievance is **GRANTED**. Respondent is hereby **ORDERED** to compensate Grievant in the amount of ten ($10) dollars per hour for each of the 20.75 hours worked without pay, and ten ($10) dollars per hour for ten (10) hours each working day from April 15, 1994, the day the second class began, until May 8, 1994, when Grievant's contract expired.

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

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MARY JO ALLEN

Administrative Law Judge

Dated: July 26, 1994

Footnote: 1 *Several allegations were made by Southwest's representative regarding Mr. Walker and Grievant in support of its decision to withdraw the school. The truth or falsity of those allegations is not relevant to the resolution of this grievance and will not be discussed in detail.*