SHARON ANDERSON

v. Docket No. 95-11-197

GILMER COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Sharon Anderson is employed by the Gilmer County Board of Education (GCBE) as a Chapter I teacher at Gilmer County High School (GCH). She filed a grievance complaining that she was never offered an extracurricular employment con tract under W.Va. Code 18A-4-16 for her work, since 1992, as Coordinator of the Academic Assistant Program (AAP). She seeks as relief such a contract, back wages to January 1, 1992, at a rate comparable to employees who performed related duties, and attorney fees.1 The parties agreed to a responsive briefing schedule to submit level four fact/law proposals, and the case became mature on July 31, 1995, the designated last day for GCBE to file a final response.

1The grievance was submitted to level four on or about May 18, 1995, at which time the parties requested a decision based on the lower level record. The record contains the adverse lower level decisions and the transcript/exhibits of the April 13, 1995, level two hearing.

There is little, if any, controversy regarding the essen tial facts in this case. Therefore, as reflected in the record as a whole, the following findings of fact are made.

Findings of Fact

1. Grievant has taught at GCH for approximately seven years. Her Chapter I duties entail work with reading-disabled

students who have low reading skills.

2. While Grievant was enrolled in a graduate program at West Virginia University (WVU) in 1991, she became interested in programs for at-risk high school students who have academic deficiencies. At that time Grievant learned of a pilot program then being developed by WVU in Monongalia County (MC).

3. The WVU/MC program which prompted Grievant's interest involved college students who were trained to tutor high school students in need of academic assistance. Grievant wanted to "export" the program to the Gilmer County school system and GCH, modifying the MC materials and training.

4. Grievant shared her idea with GCBE's administration. Eventually, Grievant received approval for release time from her teaching duties at GCH one day per week during the first term of the 1991-92 school year to attend sessions at WVU in which college students were being trained to tutor high school stu dents. Once these procedures were set in place, GCH's principal informed Grievant she would be responsible for the program for the next five years and identified cut-off dates for the tutors to be initially placed in the school. T.40.

5. In late 1991 and early 1992, Grievant finalized preparations for the tutoring program at GCH. At a March 9, 1992 meeting, GCBE approved a "tutoring program through Glenville State College," in its schools, a program very similar to the WVU/MC program. The AAP involved Glenville State College (GSC) students, who were trained to tutor GCH pupils.

6. Grievant was expressly advised when she began the AAP that GCBE had no money with which to pay her to coordinate the tutoring program. Nevertheless, Grievant proceeded to help implement the AAP at GCH.

7. Grievant became known as the AAP's Coordinator during the 1991-92 school year, by Spring 1992, at the latest. In addition, other faculty at GCH were involved with AAP, in that they had to identify, prioritize and recommend at-risk students for the AAP services.

8. As AAP Coordinator, Grievant does not tutor students at GCH; however, she interviews, selects and trains GSC students who wish to participate as tutors; schedules the tutors to serve students and maintains their time sheets; and performs other necessary work.

9. Grievant's experience with AAP has been beneficial to her in pursuing graduate work and a degree.

10. GCBE has also benefitted from the implementation of AAP. For example, the AAP at GCH figured into GCBE's accredita tion report to the State Department of Education during the 1991-92 school year.2 Moreover, the dropout rate has decreased at GCH since 1992. Grievant's belief that this change is due, in part, to the AAP, was not disputed by GCBE.

11. Grievant carries a full teaching load at GCH, and she spends about 600 hours per school year, during some of her lunch periods, after-school, and on weekends, performing AAP-related work, including the scheduling of GSC tutors. She also does program work during the summer. GCH's principal authorized Grievant to use her daily planning period for program work as she chose, and to leave work at 3:30 p.m., rather than the normal quitting time of 4:00 p.m.

12. GSC students who tutor in the AAP are paid $4.25 per hour. Teachers at GCH who actually tutor students in some capacity other than that provided by AAP, are paid on an hourly basis at their regular teaching contract rate.

13. Grievant and school officials never entered into a contract, oral or written, by which Grievant was to be paid for her volunteer work as AAP Coordinator. Prior to filing this grievance, Grievant had never even asked GCBE to enter into an extracurricular contract for her AAP work.

14. Grievant is free to quit all work in the AAP at GCH at any time.

2The report refers to the tutoring program and defines the program's "Coordinator-Trainer" as "WVU." In implementing the accreditation report at GCH, GCH's principal, too, referred to tutorial services as being secured from the program "Coordinator."

15. Grievant admits she delayed filing this grievance and seeking an extracurricular contract because she thought that GCBE might "get around" to awarding her a contract and compensa tion for her role as AAP Coordinator. At the level two hearing, Grievant explained she was unaware she might have a legal right to compensation until she recently talked to an attorney.

Discussion

GCBE raised a timeliness issue at level two. A grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. W.Va. Code 18-29-4(a)(1).

With respect to the 1994-95 school year, the grievable event was the non-issuance of an extracurricular contract when

the school year began. Grievant does not deny that she initiat ed this grievance more than fifteen days after she began work as an AAP Coordinator during the 1994-95 school year without an extracurricular contract. As to the 1994-95 school year, or any prior school years she worked as an AAP Coordinator without an extracurricular contract or compensation, Grievant's excuse for the delay in filing a grievance, that she lacked awareness of her rights in the matter, is not sufficient to toll the time lines in which to file a grievance. See, e.g., Daniels v. Dept. of Health & Human Resources, Docket No. 94-HHR-1135 (May 31, 1995).

Accordingly, this grievance is untimely with respect to Grievant's request for an extracurricular contract dating to the beginning of the 1994-95 school year or for prior years. By the same token, a claim for back wages from 1992 to the time she filed this grievance is not timely.3 However, Grievant's claim of entitlement to an extracurricular contract and compensation for present or future work as the AAP Coordinator at GCH is timely.

It is well-settled that, in a non-disciplinary case such as this, Grievant has the burden of proving her grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990). A school worker's extracurricular assignment under Code 18A-4-16 must be predicat ed upon a mutual agreement between the parties as to terms, hours and compensation. This agreement must be reduced to writing, signed by the parties, and approved by the board of education. Miller v. Mason County Bd. of Educ., Docket No. 94-26-1106 (May 15, 1995).

Simply put, Grievant has not established that GCBE is

legally bound to offer her an extracurricular contract and compensation now, or, for that matter, in the future, for her

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3In her level four brief, Grievant's only response to the timeliness issue was that GCBE's "failure to extend an offer of an extracurricular contract" amounts to "continuing wrongful conduct which began no later than January 1992, and continued during the entire 1994-95 school year[.]" Among other things, this argument ignores the fact that GCBE never approached Grievant and asked her to initiate and coordinate an at-risk program for high school students; rather, Grievant proposed the program and volunteered to do the work.
volunteer work with the AAP. A board of education is not precluded from accepting an employee's offer to perform volunteer work. In the instant case, Grievant voluntarily assumed the work of the AAP Coordinator, for which her principal accommodated her schedule somewhat. However, there was no mutual agreement between GCBE and Grievant that Grievant's work as Coordinator of AAP would amount to an extracurricular assignment or would be compensated pursuant to W.Va. Code 18A-4-16. There was no written understanding signed by the parties. GCBE neither posted the AAP assignment for competitive bid nor approved an extracurricular agreement involving Grievant's AAP work. Consequently, no agreement has been breached, and Grievant is not entitled to any back pay. Moreover, GCBE cannot be ordered to enter into a written agreement with Grievant for future AAP work. Similarly, Grievant is not bound to continue to perform the AAP Coordinator work, and, at her discretion, may cease work on the program at

any time, with or without notice. This is not to say that GCBE is precluded from offering Grievant an extracurricular contract and compensation for any AAP work in the future.

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

Conclusions of Law

1. In a non-disciplinary case, the grievant has the burden of proving her grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. Grievant timely filed a grievance on the issue of whether GCBE was legally obligated to offer her an extracurricu lar contract per W.Va. Code 18A-4-16 for present or future work to be performed as an AAP Coordinator; however, she failed to timely file on the issue of retroactive wages to January 1992. See W.Va. Code 18-29-4(a)(1); Daniels v. Dept. of Health & Human Resources, Docket No. 94-HHR-1135 (May 31, 1995).

3. Under Code 18A-4-16, a teacher's extracurricular assignment must be by mutual agreement, reduced to writing, signed by the parties, and approved by the board of education. Miller v. Mason County Bd. of Educ., Docket No. 94-26-1106 (May 15, 1995).

4. Inasmuch as Grievant and GCBE did not enter into any formal agreement regarding Grievant's involvement with the tutoring program at issue, there is no "contract" to breach, and she may cease work on the AAP program at any time, with or without notice.

5. Grievant failed to establish that she performed the tutoring program work with any realistic expectation that she would be paid for those duties. See Id; Vencill v. Kanawha

County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994).

6. Grievant performed the coordinator's work with the tutoring program voluntarily and without any promise, implied or otherwise, that she would be paid any sum over and above her regular teaching salary; thus GCBE is not legally obligated to compensate Grievant for the work. See Miller v. Mason County Bd. of Educ., supra; Bennett/Dean v. Fayette County Bd. of Educ., Docket No. 91-10-231/235 (May 13, 1992).

Accordingly, this grievance is DENIED in its entirety.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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: August 1, 1995