**PATRICIA JOHNSON**

**v. Docket No. 96-31-007**

**MONROE COUNTY BOARD OF EDUCATION**

## DECISION

The grievant, Patricia Johnson, is employed by the Monroe County Board of Education (Board) as a bus operator. She filed a grievance October 13, 1995, alleging that the Board had miscalculated her overtime pay for the 1994-95 school year. Her supervisor was without authority to grant relief, and the grievance was denied at Level II following a December 20, 1995 hearing. The Board, at Level III, declined to address the matter, and appeal to Level IV was made January 10, 1996. The parties subsequently agreed to submit the case for decision on the record developed at Level II. The grievant submitted proposed findings of fact and conclusions of law by April 29, 1996; the Board's legal position is set forth in the Level II findings and conclusions. (See footnote 1)

### Background

There is no dispute over the facts of the case. On March 12, 1994, the voters of Monroe County rejected an “excess levy” property tax proposal. (See footnote 2) Pursuant to W.Va. Code 18A-4-5(b), the defeat of the levy meant a reduction in the amount of state “equity” funding the Board would receive for the July 1, 1994, to June 30, 1995 fiscal year. (See footnote 3) On March 17, 1994, the Board voted to reduce all employees' salaries effective July 1, 1994; (See footnote 4) employeeswere notified of this action by hand delivered letters on March 18, 1994.

The Board determined that after the elimination of the county supplement and the corresponding loss of equity funding, the grievant's daily rate of pay for the 1994-95 school year would be $63.00; her contract of employment for that year reflected that amount. The grievant fully understood that she

had incurred a loss of $1.00 per day. She did not then file any protest, formal or otherwise, over the reduction in pay.

In State ex rel. Bd. of Educ. of the County of Randolph v. Bailey, 453 S.E.2d 368 (W.Va. 1994), the West Virginia Supreme Court of Appeals held that Code §18A-4-5(b) was unconstitutional "to the extent that it fixes a county entitlement to state equity funding based upon whether an excess levy was in effect on a particular date and continues to limit that county's funding to the specific amount awarded on that date, even if the county's voters subsequently reject continuation of the levy at the polls." The Court found that the plaintiffs in the case, the Randolph and Upshur county boards of education, were due reimbursement for equity fund losses incurred following the defeat of excess levies in those counties in 1991 and 1993.

Apparently, the Circuit Court of Kanawha County was directed to calculate the amount owed the two counties; at some point, Monroe and Preston counties became parties in the case. It waseventually determined that the four county boards were owed $1,944,746.00.

During its 1995 regular session, the Legislature appropriated $1,500,000.00 to be paid toward the judgment. The allocation included the following proviso:

> It is the intent of the Legislature that the above appropriation for County Boards of Education Lawsuits be distributed to the Monroe County Board of Education, the Preston County Board of Education, the Randolph County Board of Education and the Upshur County Board of Education for equity funding and that each county be paid the proportional amount that the equity funding due to the individual county bears to the total amount of $1,944,746 which is due to all four counties. It is the further intent of the Legislature that the remaining equity funding due to each county will be paid during the 1997 fiscal year.

In October 1995, all Board employees received lump sum payments which were approximately 77% of the amount of equity funds they would have received during the 1994-95 school year had the Board received its proper share of those funds. They were notified that the remaining 23% would be paid during the 1996-97 school year.

The grievant was paid for 137 hours and 19 minutes overtime during the 1994-95 school year at a rate which was based on her $63.00 daily salary. Shortly after receiving her lump sum payment, the grievant determined that she was owed an additional $27.50, the difference in the amount she received for the overtime and the amount she would have received had the calculation of her daily rate included the equity funds. The Board rejected her request for the additional pay.

## Argument

The grievant notes that W.Va. Code §21-5C-3(b) requires that in calculating an employee's hourly rate for the purposes of overtime, the employer must include “all remuneration for employment.” She argues as follows:

> The “equity” supplement was clearly part of the remuneration paid to Grievant as a result of her employment with the Respondent. There are seven enumerated exceptions to the above stated general rule contained within the provision. However, none of these exceptions bear any relation to the “equity” supplement. The fact that this supplement was paid in a lump sum after the expiration of the year does not alter the nature of that sum. It must be considered part of the regular salary regardless of when it was actually paid to the employees.

The grievant further contends,

> Any complaint by Grievant concerning failure to include the equity supplement in the computation of Grievant's regular rate would not be appropriate until the “equity” supplement was actually paid to the employees. Therefore, initiation of the present grievance approximately one week after receipt of the equity supplement constitutes a timely filing under West Virginia Code §18-29-4(1)

The Board characterizes the grievance as an attempt to “retroactively” alter the terms of the grievant's 1994-95 contract of employment. The assertion is, in essence, a challenge to the timing of the grievance; for the reasons discussed below, the undersigned concludes that the complaint was not timely filed.

## Findings and Conclusions

W.Va. Code §18-29-4(a), in pertinent part, provides,

> Before a grievance is filed and 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 withinfifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

. . .

> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated representative on a form furnished by the employer or agent.

It is apparent that the grievant bases her claim on an allegedly erroneous calculation of her 1994-95 daily rate of pay. It is specious to say that the grievable event was her receipt of the lump sum payment in October 1995. Since, as previously discussed, the calculation was made prior to September 1994, and the grievance was not filed until October 1995, the grievant obviously did not meet the deadlines specified in the statute.

To the extent that the failure to pay a higher overtime rate could be considered a continuing practice, the grievant failed to show that the complaint was filed "within fifteen days of the most recent occurrence" of that practice. There is no evidence of record concerning the dates on which the grievant worked beyond her regular shift.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Monroe 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 itsAdministrative 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: August 30, 1996

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*Footnote: 1*

*In an August 22, 1996 telephone conference call, the undersigned clarified certain portions of the record with the grievant's counsel and Superintendent of Schools Lyn Guy. Ultimately, these matters had little bearing on the outcome in the case.*

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*Footnote: 2*

*W.Va. Const. article X, § 10, provides that with voter approval, "the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years. . ."*

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*Footnote: 3*

*The statute, in pertinent part, provides,*

*Pursuant to this section, each teacher and school service personnel shall receive the amount that is the difference between their authorized state minimum salary and ninety-five percent of the maximum salary schedules prescribed in section five-a and five- b [§§18A-4-5a and 18A-4-5b] of this article, reduced by an amount provided by the county as a salary supplement for teachers and school service personnel on the first day of January of the fiscal year immediately preceding that in which the salary equity appropriation is distributed.*

*. . .*

*Provided, however, That any amount received pursuant to this section may be reduced proportionately based upon the amount of funds appropriated for this purpose.*

*(Emphasis added.) This provision creates a disparity in treatment between counties which vote to discontinue an excess levy subsequent to January 1 of a given year and counties which defeat such levies during the preceding year. The former are penalized for one fiscal year in that they are treated as having excess levy funds for the upcoming school year when they do not. This difference in treatment was the subject of Bailey, infra.*

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*Footnote: 4*

*W.Va. Code §18A-4-5a provides that a county board of education may reduce local funds allocated for salaries when "forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction. . ." There is no dispute that state boardapproval was given for the reduction discussed herein.*