

WILLARD JEFFERS,

Grievant,

DOCKET NO. 95-26-553

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Willard Jeffers, alleges he has been working out of classification in violation of W. Va. Code 18A-4-8a. On May 16, 1991, Respondent Mason County Board of Education posted a supplemental position titled "For Additional Responsibilities as Asbestos Inspector". Although titled "Asbestos Inspector", the position description which accompanied the posting listed more responsibilities than simple inspection. Grievant was hired for this twelve month position and signed a one-year contract that paid a supplement of \$1200 per year. In 1992, he asked and received a raise in his supplement to \$3000 per year because as he stated, "There was more work than I thought was involved when I took the job." Neither the job responsibilities nor the position description were altered in the 1992 contract. The contract was then renewed each of the following years.

In his grievance form, Grievant states, "My contract was for an asbestos inspector and I was required to do both the asbestos inspector's duties as well as the management planner's duties." Grievant seeks back pay commensurate with his actual job duties, attorney fees, interest, and costs. This grievance was filed August 30, 1995. An affirmative timeliness defense was raised at Level I by the Respondent. The grievance was denied, and that decision was appealed to Level II where the grievance was again denied because "grievant did not show any violation of 18A-4-8a." This decision was then appealed to Level IV. A hearing was waived by the parties and the case was submitted on the record.

DISCUSSION

Misclassification claims under W. Va. Code § 18A-4-8a do not apply to extracurricular assignments. The supplemental contracts entered into by Grievant and Respondent are extracurricular assignments and are governed by W. Va. Code § 18A-4-16. An extracurricular assignment under W. Va. Code § 18A-4-16 must be predicated 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., 94-26-1106 (May 15, 1995). ([See footnote 1](#))

The supplemental contracts for Asbestos Inspector were reduced to writing, signed by the parties, and approved by Respondent as is called for under the statute. Grievant was under no obligation to accept any of the annual supplemental contracts. In fact, the statute expressly provides for Grievant's right to refuse the extracurricular assignment without repercussion. "An employee's contract of employment shall be separate from the extracurricular assignment provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment agreement proposed by the superintendent, a designated representative, or the board." W. Va. Code § 18A-4-16(4). Grievant is not classified as an "Asbestos Inspector." He entered into a separate extracurricular contract for the assignment of Asbestos Inspector. Grievant was free to negotiate the terms and conditions of that contract each year to achieve the salary and job duties he desired. Thus, Grievant cannot prevail on a misclassification claim under an extracurricular assignment contract.

W. Va. Code § 18A-4-8a(9), however, provides some guidelines for paying employees for asbestos removal duties and the supervision of asbestos removal duties:

The minimum pay for any service personnel employees engaged in the removal of asbestos material or related duties required for asbestos removal shall be their regular total daily rate of pay and no less than an additional three dollars per hour or no less than five dollars per hour for service personnel supervising asbestos removal responsibilities for each hour these employees are involved in asbestos related duties. Related duties required for asbestos removal shall include, but not be limited to, travel, preparation of the work site, placing and removal of equipment and removal of

structures from the site.

Grievant does not argue he was receiving less than what is called for under this statute.

Finally, an employer raising the affirmative defense of timeliness bears the burden of proving the grievance was untimely failed by a preponderance of the evidence. W. Va. Code § 18-29-4(a)(1) requires that an employee initiate grievance proceedings by scheduling a conference with his immediate supervisor "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date most recent occurrence of a continuing practice giving rise to a grievance." Because this grievance is not one of misclassification, it cannot be deemed a continuing practice violation. See Marrs v. Doddridge County Bd. of Educ., Docket No. 89-09-278 (Nov. 30, 1989); Turner v. McDowell County Bd. of Educ., Docket No. 33-86-049 (Apr. 14, 1986). There is some evidence that the supplemental contract for Asbestos Inspector was renewed each year by Grievant and Respondent, however, no evidence was presented as to the date of renewal for the most recent school year, i.e., 1995-96. Grievant filed this grievance on August 30, 1995, at the beginning of the 1995-96 school year. Respondent has failed to prove by a preponderance of the evidence that the grievance is untimely for the 1995-96 school year, although the grievance is clearly untimely for the previous years.

Based upon the foregoing discussion and the record developed below, it is appropriate to make the following findings of fact and conclusions of law.

FINDINGS OF FACT

- 1. Grievant is employed by Respondent as a General Maintenance/Truck Driver/Carpenter I/Plumber II/Electrician I/Sanitation Plant Operator assigned to the Maintenance Department.**
- 2. Respondent posted an Asbestos Inspector supplemental position on May 16, 1991.**
- 3. Grievant applied for and was hired for the supplemental position and signed a one year contract paying \$1200 per year.**
- 4. In 1992, Grievant asked for and received a raise on this supplemental contract to \$3000 per year. No additional duties were added to the original supplemental contract.**
- 5. The supplemental contract for Asbestos Inspector has been renewed each ensuing year, including the 1995-96 school year.**

6. This grievance was filed on August 30, 1995.

CONCLUSIONS OF LAW

1. W. Va. Code § 18-29-4(a)(1) requires that an employee initiate grievance proceedings by scheduling a conference with his immediate supervisor "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date most recent occurrence of a continuing practice giving rise to a grievance."

2. Classification claims under W. Va. Code § 18A-4-8a do not apply to extracurricular contract assignments.

3. Respondent bears the burden of proving the affirmative defense of timeliness. Respondent has not proven by a preponderance of the evidence that Grievant's claim is untimely as to the 1995-96 school year. Grievant's claims for previous years are untimely.

4. An extracurricular assignment under W. Va. Code § 18A-4-16 must be predicated 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., 94-26-1106 (May 15, 1995).

5. An employee's contract of employment shall be separate from the extracurricular assignment provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board. W. Va. Code § 18A-4-16(4).

6. The minimum pay for any service personnel employees engaged in the removal of asbestos material or related duties required for asbestos removal shall be their regular total daily rate of pay and no less than an additional three dollars per hour or no less than five dollars per hour for service personnel supervising asbestos removal responsibilities for each hour these employees are involved in asbestos related duties. Related duties required for asbestos removal shall include, but not be limited to, travel, preparation of the work site, placing and removal of equipment and removal of structures from the site. W. Va. Code § 18A-4-8a(9).

7. Grievant has not proven that his supplemental contract violated the provisions of W. Va. Code §§ 18A-4-16 or 18A-4-8a(9).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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.

MARY JO SWARTZ

Administrative Law

Judge

Date: August 22, 1996

[Footnote: 1](#)

Extracurricular assignments shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. W. Va. Code § 18A- 4-16a.