

BRENDA DOSS, et al.,

Grievants,

v.

Docket No. 97-38-054R

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance is before the Grievance Board on remand from the Circuit Court of Kanawha County. The Final Order of that Court, dated February 18, 1999, reversed the decision of this Board dated August 28, 1997, and remanded this grievance for "further proceedings consistent with this Order." ([See footnote 1](#)).

The Grievants, Brenda Doss, Judy Sanders, Rebecca Sparks, Lucille Withers, and Hannah Beverage, are employed by the Pocahontas County Board of Education ("PBOE") as Paraprofessional/Aide IVs. They filed their grievance when PBOE changed their pay grade from G to F, and reduced their pay accordingly in October 1996. They sought as relief "retroactive wages, interest on all sums, and benefits." By decision dated August 28, 1997, this Grievance Board found Grievants had failed to prove they were entitled to compensation at a pay grade G, and denied the grievance.

Grievants appealed the Level IV decision to the Circuit Court of Kanawha County. The Final Order of that Court reversing the Level IV decision states as follows:

The Grievance Board held that the petitioners are not entitled to be compensated at pay grade "G". The Grievance Board relied on the opinion of the state superintendent, recognizing that the superintendent's opinion is entitled to great weight unless clearly erroneous. The state superintendent opined that the 1996 amendments were designed for a single purpose, to allow employees who are multiclassified as aides and paraprofessionals to accrue seniority in both classifications. He further opined that only employees hired as a "full-time aide(s)" are entitled to an increase in pay grade pursuant to the provisions of W. Va. Code § 18-5-8(a), and that paraprofessionals are compensated at pay grade "F" because they supervise students as part of their assigned duties.

The Court is of the opinion that the decision of the state superintendent is clearly erroneous. First, the superintendent did not consider the difference between the type of supervision described in § 18-4- 8 and that described in § 18-5-8(a). By definition, a paraprofessional provides supervision of students under the direction of a principal, teacher or other designated professional educator. In the language of W. Va. Code § 18-5-1, when an employee, whether an aide or a paraprofessional/aide, is assigned supervisory duties pursuant to § 18-5-8(a), he or she "stand(s) in the place of the parent(s), guardian(s) or custodian(s)" in exercising authority over the pupils. It is clear that the supervisory authority exercised under § 18-5-8(a) is greater than that exercised by a paraprofessional as part of his or her everyday duties when acting at the direction of a principal, teacher or other professional educator.

More importantly, the opinion of the state superintendent also does not address the effect of the 1996 amendment to the second paragraph of § 18-5-8(a). If the legislature had intended to provide greater compensation to full-time aides, it would not have amended the statute. Prior to the amendment, the statute provided an increase of one pay grade only to those employees classified as aides. It did not provide for an increase in pay grade to any other classification, including paraprofessionals. In fact, the statute as it existed prior to the 1996 amendment, provided exactly what the state superintendent opines that it currently provides.

When a statute is amended, two things are presumed: First, that the legislature knew the language employed in its former acts; and Second, that if in the same statute on the same subject the legislature uses different language in the same connection, then the courts must presume that a change in the law was intended. Butler v. Rutledge, 174 W. Va. 752, 329 S.E.2d 118 (1985). Consequently, when the legislature amended the statute to eliminate aides as the sole classification entitled to an increase in pay grade, it clearly intended that other classifications to [sic] be covered by the statute. The classification of employees to which this change would most logically apply is paraprofessionals.

Since § 18-5-8(a) applies to paraprofessionals, including the petitioners, and they perform duties described in that statute, they are entitled to compensation at the higher pay grade.

The parties spent several months attempting to settle this matter before submitting it for decision. A conference call was conducted by the undersigned on October 13, 1999, in order to determine the issues to be addressed, and whether a hearing was necessary. The parties agreed that a decision could be made based upon the record previously developed, supplemented by a stipulation of fact on the date the Grievants' salaries were reduced to a pay grade F, and written argument. The parties agreed that the sole issue to be decided by the undersigned was whether Grievants were to receive back pay to the date of the change in pay grade, plus interest ([See footnote 2](#)), or whether the date the Circuit Court's Order was effective was at a later time, as the Court's Order does not specifically

address this issue. Respondent's counsel, Walter W. Weiford, agreed to obtain the effective date of the pay reduction from PBOE's records, and the parties were to submit this date as stipulation of fact. Neither party indicated that this would be a problem. A briefing schedule was also set. Grievants' brief was filed on October 26, 1999, by their counsel, John Everett Roush. Respondent's brief was due two weeks after receipt of Grievants' brief. Respondent's counsel did not file a brief, and the stipulation of fact was not submitted by the parties. On December 3, 1999, the undersigned wrote to the parties, giving them until December 13, 1999, to submit the stipulation of fact, and also extending the time for Respondent's brief until that date. No response was received from Mr. Weiford. Mr. Roush orally requested an extension of time.

Finally, in mid-February 2000, after exchanges of proposed stipulations, it became clear that the parties could not agree without intervention. At a conference call on March 6, 2000, the parties represented that they had finally agreed to a joint exhibit which would show the amount of pay Grievants would have received had they been paid at a pay grade G for the entire 1996-97 school year, and the pay they actually received for that school year. That exhibit was received by the Grievance Board on March 7, 2000. It is an 11 page document consisting of salary information, and will be marked as Joint Exhibit 1 and is Ordered admitted into evidence.

The following Findings of Fact are made from the evidence of record, and are based in large part upon the Findings of Fact previously made by this Grievance Board in its Decision dated August 27, 1997, except that Finding of Fact Number 4 is derived from Joint Exhibit 1.

FINDINGS OF FACT

1. At the time this grievance was filed in October 1996, Grievants were employed by PBOE as Paraprofessional/Aide IVs.
2. At the beginning of the 1996-97 school year, Grievants were paid in accordance with the pay scale for a pay grade G.
3. In October 1996, PBOE determined Grievants should be paid in accordance with the pay scale for a pay grade F, and reduced their pay accordingly. This reduction in pay was not based upon any change in Grievants' duties. It was based upon an opinion of the State Superintendent of Schools, sent to PBOE Superintendent Thomas E. Long, dated October 16, 1996.
4. Had Grievants been paid at a pay grade G for the entire 1996-97 school year, each would

have earned \$270.00 more that year.

DISCUSSION

Had this grievance been granted by the Grievance Board in the Decision issued on August 28, 1997, Grievants would have been entitled to back pay, plus interest, from the date their pay was reduced. The undersigned finds nothing in the Order of the Kanawha County Circuit Court which would support a finding that Grievants should not receive back pay. To the contrary, the Order says the Decision of the Grievance Board is reversed. Respondent has presented no reason why the result should be different simply because it initially erroneously prevailed, and the undersigned sees no good reason why Grievants should not be awarded back pay to October 1996, as though they had initially prevailed. Further, "[o]rdinarily, the relief provided to a grieving employee . . . involves a 'make-whole' remedy, intended to restore the employee to his or her rightful place as an employee" Gillispie v. Kanawha County Bd. of Educ., Docket No. 98-20-216 (Aug. 26, 1998). "This Grievance Board has previously recognized that back pay damages are essentially wages which the employee would have received had the employer not wrongfully deprived the employee of such wages and the opportunity to benefit from their use. Stickley v. Berkeley County Bd. of Educ., Docket No. 95-02-573 (Feb. 20, 1998); Yokum v. Randolph County Bd. of Educ., Docket No. 97-42-299 (Jan. 14, 1998). Accordingly, this Board has determined that 'full reimbursement is not accomplished unless prejudgment interest is received.' Stickley, *supra*; Yokum, *supra*. Accord, Blankenship v. W. Va. Dep't of Health & Human Resources, Docket No. 90-H-438 (Sept. 30, 1991), *rev'd on other grounds*, 189 W. Va. 342, 431 S.E.2d 681 (1993)." *Id.* The goal of back pay is "to place the prevailing parties in the same position as they would have been had they not been deprived of the sum owed them and had benefitted from full use of the money during the period of deprivation." Hensley v. W. Va. Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998). Thus, in order to make Grievants whole, and properly reimburse them for the wages withheld from them, it is necessary to award Grievants back pay from the 1996-97 school year, and prejudgment simple interest on those wages at the statutory rate (W. Va. Code § 56-6-31).

Respondent pointed out that it had acted in good faith in reducing Grievant's pay to a pay grade F, and Grievants agreed. However, an interest award is not punitive. Grievants were entitled to receive more money than they actually received. Grievants have not had the use of this money, Respondent

has. The calculation of the amount of money Grievants are to receive necessarily includes an interest factor for the use of the money.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. "Ordinarily, the relief provided to a grieving employee . . . involves a 'make- whole' remedy, intended to restore the employee to his or her rightful place as an employee . . ." Gillispie v. Kanawha County Bd. of Educ., Docket No. 98-20-216 (Aug. 26, 1998).

2. "This Grievance Board has previously recognized that back pay damages are essentially wages which the employee would have received had the employer not wrongfully deprived the employee of such wages and the opportunity to benefit from their use. Stickley v. Berkeley County Bd. of Educ., Docket No. 95-02-573 (Feb. 20, 1998); Yokum v. Randolph County Bd. of Educ., Docket No. 97-42-299 (Jan. 14, 1998). Accordingly, this Board has determined that 'full reimbursement is not accomplished unless prejudgment interest is received.' Stickley, supra; Yokum, supra. Accord, Blankenship v. W. Va. Dep't of Health & Human Resources, Docket No. 90-H-438 (Sept. 30, 1991), rev'd on other grounds, 189 W. Va. 342, 431 S.E.2d 681 (1993)." Gillispie, supra.

3. Had Grievants initially prevailed in their grievance, they would have been entitled to back pay, plus interest, for the 1996-97 school year. The result should not be different simply because this Grievance Board denied the grievance, and that Decision was reversed at a later time by the Circuit Court of Kanawha.

Accordingly, **IT IS ORDERED** that Respondent, Pocahontas County Board of Education pay to Grievants, within thirty days of the date of this Decision, all back pay to which they are entitled, plus prejudgment interest, in the amount of the difference between the amount of pay each actually received, and the amount each would have received had they been paid in accordance with the pay scale for a pay grade G, from the 1996-97 school year through the date PBOE began compensating each at a pay grade G again, or through the date any of the Grievants ceased being multi-classified as a Paraprofessional/Aide IV, whichever is earlier. Interest shall be calculated at the statutory rate (W. Va. Code § 56-6-31) from the dates Grievants would have received the wages had they been paid at a pay grade G. In addition, Respondent, Pocahontas County Board of Education, shall provide to Grievants any and all benefits of which they were deprived, if any, as a result of paying Grievants

the wrong amount.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Pocahontas County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 16, 2000

[Footnote: 1](#)

The Court's Order also addresses a companion grievance filed by Mary Sites and Juanita Murphy against the Pendleton County Board of Education, which had also been decided against the grievants by this Grievance Board by decision dated August 28, 1997, Docket No. 97-36-113. The parties to that grievance were able to reach a settlement of the remaining issues after the Court's Order. Accordingly, that grievance is not addressed in this Decision.

[Footnote: 2](#)

Although Grievant's counsel had also included a request for attorney fees, he acknowledged that the Grievance Board has taken the position that it has no authority to award them and conceded that this issue need not be addressed.