PATTI BOWLES,

Grievant,

v.

DOCKET NO. 03-DOH-131

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Patti Bowles, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on or about January 23, 2003, alleging a "[s]ettlement agreement signed June 7, 2002, was breached by WVDOH." A level three hearing was conducted on February 24, 2003, and the grievance was dismissed at level three by Grievance Evaluator Brenda Craig Ellis on May 1, 2003. Grievant appealed to level four on or about May 19, 2003. Following several continuances for good cause, this matter came on for hearing before the Grievance Board in its Charleston, West Virginia, office on November 17, 2003. Grievant chose not to appear at the hearing, but elected to submit proposed findings of fact and conclusions of law. DOH appeared and was represented by Barbara Baxter, Esq. This matter became mature for decision on January 17, 2004.

Based upon a review of the testimony and evidence, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant filed three separate grievances against DOH, which it numbered 2002-0199-DFH-001, 2002-0199-OT-002, and 2002-0199-DFH-012.

2. Settlement negotiations were undertaken regarding the above three grievances, and on May 31, 2002, Grievant sent a memorandum to Jeff Black, Human Resources Director, with proposed terms of the settlement. That proposal included a provision that another position would be found for her within six months, or by December 1, 2002.

3. On June 7, 2002, Grievant and DOH entered into a settlement agreement resolving the above three grievances.

4. The Settlement Agreement provides as follows:

> The party in the above-styled case agrees to settle the grievance as follows:
>
> Ms. Bowles will receive a 7 ½ % (seven and one-half percent) increase effective October 1, 2001.
>
> Employee Performance Appraisal dated April 9, 2002 signed by John Dawson, all categories marked “Needs Improvement” changed to “Meets Expectations.”
>
> Both DOH and Ms. Bowles agree that the Agency (DOH) will continue to identify a position or positions to which Ms. Bowles can be assigned with no loss of pay.
>
> Ms. Bowles will drop any and all grievances pending with the Department of Highways, regardless of the level at which they are pending.

5. Grievant executed the Settlement Agreement on June 7, 2002.

6. Mr. Black executed the Settlement Agreement for DOH on June 7, 2002. 7. The three grievances cited in Finding of Fact No. 1 were dismissed from the level three docket by Order dated June 11, 2002.

8. Grievant received the 7-1/2% salary increase in accordance with the Settlement Agreement.

9. Grievant's Performance Appraisal was revised according to the terms of the Settlement Agreement.

10. Grievant was temporarily assigned to an Administrative Secretary position in the Executive Division, outside of District 1, on February 4, 2002

11. In an August 29, 2002 email, Grievant informed Mr. Black that she expected a permanent position to be found by December 1, 2002. Mr. Black told Grievant that no time frame had been agreed upon in Settlement Agreement, but he would agree to a six- month time frame beginning August 29, 2002 through the end of February 2003.

12. By letter dated January 23, 2003, Grievant informed Ms. Ellis that she believed DOH breached the Settlement Agreement, and requested hearings be scheduled for the grievances cited in Finding of Fact No. 1.

13. Effective February 27, 2003, Grievant accepted a permanent position with DOH, which was the same position she had been occupying on a temporary basis since February 4, 2002.

14. Ms. Ellis conducted a hearing on February 24, 2003, on Grievant's breach of Settlement Agreement claim, and concluded there had been no breach.

15. Grievant appealed Ms. Ellis' decision to level four on May 19, 2003.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden of proof. Id.

Grievant claims that, under the terms of the Settlement Agreement, she was to be placed in a position within six months of signing of Agreement, or by December 1, 2002, and because she had not been placed into a permanent position by that date, DOH had breached the terms of the Agreement. DOH denies it breached the Settlement Agreement, and points out that the Agreement itself does not contain any specific time frame in which placement of Grievant was to occur.

This Grievance Board has long followed the maxim that “[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in

contravention of some law or public policy." Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968). See Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 20010. Seealso Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

The West Virginia Supreme Court of Appeals has held that a contract merges all negotiations and representations which occurred before its inception, and in the absence of fraud, mistake or material misrepresentations, extrinsic evidence cannot be used to alter or interpret language in a written contract, which is otherwise plain and unambiguous on its face. Yoho v. Borg-Warner Chemicals, 185 W. Va. 265, 406 S.E.2d 696 (1991).

Ordinarily, [a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, Cotiga Dev. Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962). "However, [t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. pt. 1, Berkeley County Pub. Serv. Dist. v. Vitro Corp. of America, 152 W. Va. 252, 162 S.E.2d 189 (1968). See Rush, et al. v. W. Va. Dept. of Health and Human Res., 94-HHR-279 (Feb. 7, 1995), *aff'd* Kanawha County Cir. Ct., Case No. 95-C-130-B (Apr. 22, 1999).

"In making such a determination of contractual ambiguity, we consider whether the subject contract is capable of more than one interpretation. Thus, [c]ontract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syl. pt. 6, State ex rel. Frazier & Oxley, L.C. v. Cummings, 212 W. Va. 275, 569 S.E.2d 796 (2002). Once we have determined a contractto be ambiguous, we look to the parties' relationship to glean the parties' intent in entering into the agreement under scrutiny. " "Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be considered to alter the legal effect of or to engraft stipulations upon language which is clear and unambiguous." Syl. pt. 5, Cotiga, 147 W. Va. 484, 128 S.E.2d 626.

The issue to be resolved in this dispute is the time frame in which the obligations of the parties are to be performed. The Settlement Agreement is silent as to the time frame in which DOH was to

find Grievant a position.

Generally, failure of the parties to fix time or definite time for performance does not normally defeat a contract; instead, the law usually implies that performance shall be within a reasonable time. First Nat. Bank of Bluefield v. Clark, 191 W. Va. 623; 447 S.E.2d 558 (1994).

Grievant introduced a memorandum to Cheryl Booker, and employee in Mr. Black's office, dated May 31, 2002, prepared in contemplation of the settlement conference to be held on June 7, 2002, which states:

> This is what I would like to see happen by next Friday, June 7, 2002:
>
> 7 ½% percent merit increase retroactive to October 1, 2001.
>
> Employee Performance Appraisal dated April 9, 2002 signed by John Dawson, all categories marked 'Needs Improvement' changed to 'Meets Expectations'.
>
> I am willing to allow them 6 months from June 1, 2002 to December 1, 2002 to find me a position.

LIII G. Ex. 1.

Clearly, all of Grievant's proposals were incorporated into the final Settlement Agreement, except the time frame for securing her another position. Grievant asserts it was always her understanding that a position would be found for her by December 1, 2002, even though that date was not included in the Settlement Agreement, and even though she signed it without that condition stated in writing.

DOH argues no such time frame was agreed to as evidenced by its absence in the Settlement Agreement. In the alternative, DOH argues that if a time were agreed to, it began on August 29, 2002, when Mr. Black, responding to an email from Grievant, stated, “[w]e did not put time frame in the agreement, but we have now put a time frame in place.” LIII G. Ex. 1. DOH argues this is the only evidence of a possible meeting of the minds regarding a six-month time frame, and Grievant was placed into a permanent position within six months of this date, on February 27, 2003.

Grievant vehemently denies she agreed to a six-month time frame beginning on August 29, 2002

and ending February 27, 2003, and there certainly is nothing in writing which would confirm Grievant agreed with this date. DOH, on the other hand, vehemently denies there was an agreement to a six-month time frame beginning on June 7, 2002, the date of the Settlement Agreement. The undersigned finds Grievant's evidence more persuasive that discussions occurred before the signing of the Settlement Agreement which included a termination date by which the terms of the contract were to be fulfilled. Therefore, the undersigned finds that inserting a six-month time frame for the completion of the contract from June 1, 2002 to December 1, 2002, to be reasonable.

That being said, the undersigned also finds the relief which Grievant seeks for DOH's “failure” to perform this term of the contract in a timely manner does not flow fromthe breach. The appropriate relief for a breach of contract claim is to either compel the breaching party to perform the contested condition, or to invalidate the contract as a whole, and return the parties to their respective positions which existed prior to the execution of the contract. In this case, Grievant has very explicitly rejected any attempt to return her to the same position she was before the agreement was entered into, i.e., her previous job at her previous salary. Grievant instead wants to keep her new job at her 7 ½% higher salary, and be able to proceed with the grievances she agreed to withdraw as consideration for those benefits. Grievant wants to have her cake and eat it, too. That is not an acceptable resolution to this conflict.

Quite frankly, the undersigned believes this grievance became moot once Grievant accepted her permanent position on February 27, 2003. However, in an effort to resolve this matter in a satisfactory manner to both parties, the undersigned agreed to decide this matter on the merits presented. Most interesting to the undersigned is the fact that Grievant did not file this grievance until shortly before she was offered her permanent position in February 2003. Grievant knew from at least August 29, 2002, that DOH was operating on a six-month time frame different from her own, yet did not nothing until it became apparent that DOH was actually going to fulfill the terms and conditions of the settlement agreement in full. The undersigned finds Grievant's timing in this regard to be suspect.

Therefore, in its interests of fairness, the undersigned concludes that DOH operating in good faith to find Grievant a permanent position in accordance with the terms of the Settlement Agreement. The undersigned also finds that because Grievant did not contest the timeliness of the Settlement Agreement until January 30, 2003, nearly two months *after*the expiration of the six-month time from dating from June 1, 2002, and shortly before accepting her permanent position, Grievant in effect

agreed to the extension of the six- month time frame to February 23, 2003, as set forth by Mr. Black's memorandum of August 29, 2002.

The above findings and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden of proof. Id.

2. This Grievance Board has long followed the maxim that “[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968). See Myers v. Harrison County Bd. of Educ., Docket No. 01-13-013 (Nov. 21, 20010. Seealso Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

3. The West Virginia Supreme Court of Appeals has held that a contract merges all negotiations and representations which occurred before its inception, and in the absence of fraud, mistake or material misrepresentations, extrinsic evidence cannot be used to alter or interpret language in a written contract, which is otherwise plain and unambiguous on its face. Yoho v. Borg-Warner Chemicals, 185 W. Va. 265, 406 S.E.2d 696 (1991).

4. Generally, failure of the parties to fix time or definite time for performance does not normally defeat a contract; instead, the law usually implies that performance shall be within a reasonable time. First Nat. Bank of Bluefield v. Clark, 191 W. Va. 623; 447 S.E.2d 558 (1994).

5. Grievant proved through extrinsic evidence that a reasonable time for completion of the terms of the Settlement Agreement was December 2, 2002.

6. However, Grievant's failure to pursue her breach claim in a timely manner, and acceptance of a permanent position on February 23, 2002, within the time frame under which DOH was operating, serves to invalidate her claim of breach.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, andshould 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 27, 2004