CURTIS CODY, *et al.,*

Grievants,

v. Docket No. 04-10-082

FAYETTE COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Curtis Cody is one of thirty-six grievants (collectively "Grievants") who assert that the respondent, the Fayette County Board of Education ("BOE"), violated West Virginia Code sections 18A-4-10a, 18A-4-8(m), and 18A-2-6 when it "unilaterally altered the personal/sick leave incentive plan without the participants' consent and without notice." As relief, Grievants seek "compensation for the personal/sick leave incentive at the same rate, terms, and conditions paid in prior years with statutory interest retroactive to July 10, 2003." Upon agreement of the parties, the request for relief was amended at Level IV to seek interest from July 20, 2003, rather than July 10.

The grievance was filed on October 7, 2003. It was denied at Level I on October 13, 2003, because the relief sought was beyond the scope of the grievance evaluator's authority. A Level II appeal, along with a timeline waiver, was filed on October 20, 2003. The Level II hearing was held on January 8, 2004. After their grievance was denied at Levels II and III, Grievants appealed to Level IV on February 20, 2004. The Level IV hearing took place on June 10, 2004, in the hearing room of the West Virginia Education and State Employees Grievance Board in Beckley. Upon the parties' submissions ofproposed findings of fact and conclusions of law, this grievance matured for decision on July 8, 2004,

Throughout the grievance process, Curtis Cody ("Cody") has acted as the lead grievant. He was the only grievant who appeared at the Level IV hearing, where Grievants were represented by John

Everette Roush, Esquire, of the West Virginia School Service Personnel Association, and BOE was represented by Erwin L. Conrad, Esquire.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants are regular school service personnel employed by BOE.

2 2. In July 1999, BOE adopted a one-year pilot program to reduce employee absenteeism by offering employees a bonus payment for unused, accumulated personal leave days.

3 3. Under this pilot program, each employee was offered an incentive bonus of $50.00 for each personal leave day earned but not used during the 1999-2000 school term. As initially implemented, there was no cap on the number of days for which an employee could receive the incentive bonus. Bonus payments were made separately from regular payroll payments.

4 4. This pilot incentive program was approved for one fiscal year only, was subject to annual review, and was contingent upon the availability of funds in the BOE budget.

5 5. Thereafter, in advance of the beginning of the school year, BOE re-adopted the incentive program for the1999-2000, 2000-2001 and 2001-2002 school years,respectively. In each of those three school years, BOE approved the program at a rate of $50.00 per unused leave day up to the maximum amount authorized in that particular year.

6 6. The possibility of offering the incentive program for 2002-2003 was discussed by BOE during a meeting on July 15, 2002, but no action was taken.

7 7. The incentive program was discussed during a number of ensuing meetings but BOE failed to take any action until September 15, 2003, when it adopted a modified version of the program for the 2002-2003 school year.

8 8. Payment under the incentive program, as adopted in September 2003 for the 2002-2003 school year, was reduced to $25.00 per day with a cap of fifteen days of unused leave for which an employee could receive the incentive bonus.

9 9. The cost of the 2002-2003 incentive program was approximately $233,000.00.

10 10. If the 2003-2003 incentive program had paid $50 per day for up to fifteen days of unused leave for each employee, the cost would have been approximately $466,000.00. An

expenditure of this amount would have left the school system in a deficit and without funds for other contingencies.

Discussion

A county board of education, such as BOE, is authorized to attempt to combat absenteeism by offering “a bonus at the end of an employment term for each unused day of personal leave accumulated by the employee during that employment term.” W. Va. Code § 18A-4-10a. This statute is permissive, rather than mandatory, in nature. Pursuant to this statutory authorization, BOE implemented a one-year pilot incentive program for the 1999-2000 school year. At the end of the academic year, each employee received a bonus of $50.00 for each day of personal leave earned but not used during the 1999-2000 school term.

The incentive program was not adopted for the 2002-2003 school year until the BOE meeting on September 15, 2003. Financial constraints led BOE to reduce the amount of the incentive pay to $25 per day of unused leave. Grievants now argue that BOE was compelled to fund the incentive plan at $50 per day of unused leave, as it had in past years.

In essence, Grievants claim that, based on BOE's past practices, they now have an entitlement to participate in the incentive program and to receive a bonus of $50 per day of personal leave accumulated but not used during the academic year. A similar argument was addressed and rejected by the Supreme Court of Appeals of West Virginia. *Hartman v. Bd. of Educ. of the County of Mineral*, 194 W. Va. 539, 460 S.E.2d 785 (1995). Hartman was a teacher in Mineral County who claimed that a similar incentive plan, implemented pursuant to West Virginia Code section 18A-4-10a, had become an element of his teaching contract since being adopted in the 1990-1991 school year and renewed for the 1991-1992school year. Based on budgetary constraints, the incentive plan was not offered during school year 1992-1993.

On appeal, the *Hartman* Court addressed the following question:

> Was the Mineral County Board of Education's Attendance Incentive Policy a policy of the Board subject to unilateral elimination by the Board or, once implemented by the Board, did the AIP become an element of the employment contract between the Board and the teachers of Mineral County and therefore subject to statutory provisions regarding the modification of such contracts?

Hartman, 194 W. Va. at 541, 460 S.E.2d at 787. The Court concluded that the legislature had not

intended for incentives offered pursuant to West Virginia Code section 18A-4-10a to “become, by operation of law, an element of the teachers' continuing contracts of employment.” Syl. pt. 2, *Hartman*, 194 W. Va. at 539, 460 S.E.2d at 785. Further, the Court correctly observed that a board of education would be loath to adopt an incentive program if, by doing so, it was forever bound to that commitment of its financial resources. *Hartman*, 194 W. Va. at 542-43, 460 S.E.2d at 788-89.

Both BOE and the Mineral County Board of Education made their incentive plans contingent upon whether the financial resources were available to fund the payments. Employees could not compel the Mineral County Board of Education to offer the incentive plan when it was financially unable to do so. Upon similar reasoning, Grievants are not able to establish any entitlement to compel BOE to offer an incentive bonus, let alone at the same $50 per day rate they previously enjoyed.

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievants must prove their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "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. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. West Virginia Code section 18A-4-10a authorizes a county board of education to attempt to reduce employee absenteeism by developing a plan to pay employees for leave that has been accumulated and not used during the employment term.

4 4. There is no mandatory duty on the part of a school board to develop and implement such an incentive program.

5 5. There is nothing to prevent BOE from prospectively amending or even eliminating any such incentive program. (See footnote 1) *Hartman*, 194 W. Va. at 543, 460 S.E.2d at 789.

6 6. Grievants have failed to meet their burden of proving by a preponderance of the evidence that BOE could not unilaterally decide to pay $25 per day of unused leave, up to fifteen days, in school year 2002-2003.

7 7. Grievants have failed to establish a violation of statute, regulation or policy on the part of BOE in connection with the incentive program or payments thereunder.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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 West Virginia Code section 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.

Date: August 12, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Cody presented testimony to the effect that he drove his school bus on days when he was really too ill to have done so, simply to preserve his right to receive payment for his leave time at the end of the school year. Such actions, which could have deleterious effects on the health and safety of students, obviously invite BOE to revisit the wisdom of the incentive plan even if funding is available.