



**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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CARL CARPENTER, ET AL.,

Grievants,

v.

DOCKET NO. 93-DOE-372

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by Carl Carpenter and fourteen other professional employees (hereinafter Grievants) of the Abraxas Center located in Wood County, West Virginia, alleging a violation of W.Va. Code §18A-4-17, in that the Department of Education does not include dental and vision insurance plans offered to employees of Wood County Schools in their compensation. This grievance was initiated on May 21, 1993 and denied at Level I on July 16, 1993. Grievants appealed to Level II where a decision denying their grievance was rendered on July 29, 1993. An appeal was filed at Level III and the grievance was again denied on August 19, 1993, by Henry Marockie, State Superintendent of Schools. A timely appeal

was submitted and a Level IV hearing was conducted in the Board's Charleston office on November 3, 1993.¹

The Respondent argues that this grievance should be dismissed on the basis that the Grievant has failed to state a claim upon which the relief requested can be granted by this Board.² The Respondent cites W. Va. Code §18-29-2(a) which excludes certain matters from the grievance procedure as follows:

Any pension matter or other issue relating to the state teachers retirement system in accordance with article seven-a [§ 18-7A-1 et seq.] of this chapter or other retirement system administered outside the jurisdiction of the applicable governing board, any matter relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

Standing alone, the phrase "any matter relating to public employees insurance in accordance with [W. Va. Code §5-16-1 et seq.]" would appear to support the Respondent's position. However, it is necessary to read the statute as a whole in order to confirm the intent of this provision. In this regard, §18-29-1 states:

The purpose of this article is to provide a procedure for employees of the governing boards of higher education,

¹At the conclusion of the hearing the parties elected to make post-hearing submissions. This case became mature for decision on November 29, 1993, when the Grievants' submission was received.

²Respondent initially raised this issue in a Motion to Dismiss filed shortly before the Level IV hearing. The undersigned issued an interlocutory denial of the motion at that hearing with the proviso that this issue would be reconsidered in the course of deciding this grievance. Although the Respondent did not renew this issue in its post-hearing brief, the absence of a clear waiver of the issue merits conclusively addressing the matter at this time.

state board of education, county boards of education, regional education service agencies and multi-county vocational centers and their employer or agents of their employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. (emphasis added)

Moreover, §18-29-2(a) broadly defines "grievance" to include:

... any claim by one or more affected employees ... alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination (emphasis added)

This grievance alleges a violation of W. Va. Code §18A-4-17 in regard to the total compensation and benefits made available to the Grievants by their employer. The undersigned finds that this grievance constitutes a claim alleging a statutory misinterpretation regarding compensation within the meaning of §18-29-2(a) which arose in the scope of the employment relationship within the meaning of §18-29-1. Moreover, unlike a grievance relating to insurance requiring interpretation of §5-16-1 et seq., this grievance involves interpretation of §18A-4-17, a matter in which the authority to act is vested in the Grievant's employer.³ Accordingly, the undersigned concludes that the instant grievance

³It is also noted that this jurisdictional defense was not raised until this grievance reached Level IV. The Level II decision, incorporated by reference into the Level III decision, denied the grievance on the merits based upon the employer's interpretation of W. Va. Code §18A-4-17.

is not excluded from the grievance procedure under W. Va. Code §18-29-2(a).

The salient facts in this matter are contained in the following oral stipulation of fact entered into between the parties at the Level IV hearing:

The Grievants are employees of the State of West Virginia, employed by the West Virginia Department of Education, to educate juvenile offenders at the Abraxas Foundation. Wood County makes provisions for vision and dental insurance coverage for their professional personnel.

Grievants rely upon W. Va. Code §18A-4-17 [1986] in support of their grievance. That section, entitled "[h]ealth and other facility employee salaries," provides, in pertinent part, as follows:

(a) The minimum salary scale for professional personnel and service personnel employed by the state department of education to provide educational and support services to residents of state department of health and human resources facilities, corrections facilities providing services to youthful and juvenile offenders, and in the West Virginia schools for the deaf and blind or professional personnel employed by the division of rehabilitation services facilities shall be the same as set forth in sections two, three and eight-a [§§ 18A-4-2, 18A-4-3 and 18A-4-8a] of this article. Additionally, such personnel shall receive the equivalent of salary supplements paid to professional and service personnel employed by the county board of education in the county wherein each facility is located, as set forth in sections 5-a and 5-b [§§ 18A-4-5a and 18A-4-5b] of this article....

(b) Professional personnel employed by the department to provide educational service to residents in state department of health and human resources facilities, corrections facilities providing services to juvenile and youthful offenders, or in the West Virginia schools for the deaf and the blind, or profes-

sional personnel employed by the division of rehabilitation services facilities shall be afforded all the rights, privileges and benefits established for such professional personnel under this article: Provided, That such benefits shall apply only at the facility at which employed: Provided, however, That benefits shall exclude salaries unless explicitly provided for under this or other sections of this article: Provided further, That seniority for such professional personnel shall be determined on the basis of the length of time that the employee has been professionally employed at the facility, regardless of which state agency was the actual employer.

(c) Nothing contained in this section shall be construed to mean that professional personnel and service personnel employed by the department of education to provide educational and support services to residents in state department of health and human resources facilities, corrections facilities providing services to juvenile and youthful offenders and the West Virginia schools for the deaf and blind, or professional personnel employed to provide professional educational services in the division of rehabilitation services facilities are other than state employees. (emphasis added)

This grievance can be resolved by analyzing the controlling statutory provisions. As employees of the West Virginia Department of Education employed to educate juvenile offenders at the Abraxas Foundation, the Grievants' compensation is controlled by W. Va. Code §18A-4-17. Initially, subsection 17(a) establishes a minimum salary schedule for such employees by making reference to the salary scales established in W. Va. Code §§18A-4-2, 18A-4-3, and 18A-4-8a. That subsection goes on to provide (by use of the term, "additionally") that such employees are to receive whatever "salary supplement" their host county pays to professional employees under the provisions of W. Va. Code §18A-4-5a.

W. Va. Code §18A-4-5a, includes the following provision:

Counties may provide, in a uniform manner, benefits for teachers which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the state teachers retirement system.

Grievants argue that inclusion of this provision under §18A-4-5a which otherwise addresses "[c]ounty salary supplements for teachers" indicates that these additional benefits should be included in their "compensation" per §18A-4-17. This argument fails to account for the legislature's choice of terminology in referring specifically to the narrower term "salary supplement" in §18A-4-17 instead of the broader term "compensation." Thus, if §18A-4-17(a) said that "such personnel shall receive the same compensation" or "such personnel shall be compensated in the same manner," then the undersigned would be constrained by the plain language of the statute to grant this grievance.

However, benefits and salary are two separate terms of employment which combine to constitute "compensation" and which are ordinarily not used interchangeably. Thus, while subsection 17(b) of the statute provides that such employees are entitled to the rights, privileges and benefits provided to professional personnel under "this article," there is a proviso that "benefits shall exclude salaries unless explicitly provided under this or other sections of this article." W. Va. Code, §18A-4-17(b). This proviso clearly qualifies the preceding benefits provision to which it refers. See Robbins v. McDowell County Bd. of Educ., 411 S.E.2d

466, 471 (W. Va. 1991); State v. Ellsworth J.R., 175 W. Va. 64, 331 S.E.2d 503 (1985).

Moreover, when reading §§18A-4-17 and 18A-4-5a together, it appears that the legislature consistently distinguished between "salary" and "benefits" as opposed to using those terms interchangeably. It is highly unlikely that the legislature enacted a proviso distinguishing between salary and benefits in one section of article four while using the terms interchangeably in another section of the same article. Given this deliberate choice of terminology in drafting §18A-4-17, the undersigned finds that the statute requires the Respondent to pay Grievants only the supplemental salary paid to professional employees of their host county, not including any additional benefits in the form of dental and vision insurance.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievants are professional employees of the State of West Virginia, employed by the West Virginia Department of Education to educate juvenile offenders at the Abraxas Foundation.

2. The Wood County Board of Education makes provision for vision and dental insurance for their professional personnel.

CONCLUSIONS OF LAW

1. Grievants are professional personnel employed by the Department of Education to provide educational services to

residents of corrections facilities providing services to juvenile offenders within the meaning of W. Va. Code §18A-4-17.

2. The "salary supplement" which Grievants are authorized to receive under W. Va. Code §18A-4-17 does not include optional insurance benefits offered by the host county under W. Va. Code §18A-4-5a.

Accordingly, the Grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



LEWIS G. BREWER
Administrative Law Judge

Dated: December 30, 1993