FRAYA CLARK,

Grievant,

v. DOCKET NO. 96-DOE-192

WEST VIRGINIA DEPARTMENT OF EDUCATION
WEST VIRGINIA SCHOOLS FOR THE DEAF AND BLIND,

Respondent.

DECISION

Grievant, Fraya Clark, filed a grievance against the West Virginia Schools for the Deaf and Blind (Respondent) on April 5, 1996. She alleges "I have been terminated from the language arts position at West Virginia School for the Blind effective June 15, 1996 after four continuous years of teaching in this position. This is my fourth year of employment, and I should have had a continuing contract for the 1995-96 school year." As relief, Grievant states "[t]o resolve this grievance I request to be reinstated to my position as language arts teacher with a continuing contract."

Grievant was denied relief at Levels I and II on April 18, 1996, and May 8, 1996, respectively. Pursuant to W. Va. Code §18-29-4(c), this matter was appealed directly to Level IV. On June 27, 1996, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia. The case became mature for decision on July 30, 1996, with receipt of the parties' post-hearing submissions.

Respondent's counsel asserted that the same laws which pertain to teachers employed by a county board of education are also applicable to teachers employed by it. Grievant's representative agreed with Respondent's counsel in that Respondent has chosen to apply Chapters 18 and 18A of the West Virginia Code to its personnel at the Romney school, and thus, is bound by its decision. Both agreed that in operating the school at Romney, West Virginia, Respondent was serving as the local board of education. Therefore, when necessary, Chapters 18 and 18A of the Code will be

applied as if this case involved a county board of education.

Respondent raised a timelines defense in its post-hearing submissions. However, this defense, if asserted, must be pursued in accordance with W. Va. Code §18-29-3(j). It provides, in pertinent part that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing." Therefore, this affirmative defense has not been considered. Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. On September 4, 1992, Grievant applied for a "Temporary Language Arts/Foreign Language Teacher" position with Respondent.

2. By a letter dated September 15, 1992, from Max D. Carpenter, Superintendent, Grievant was informed:

> Subject to the approval of the State Board of Education, I am pleased to notify you of our intention to employ you as a temporary Language Arts/Foreign Language Teacher at the School for the Blind from September 21, 1992 to June 15, 1993. This is temporary employment only. However, if there are vacancies for which you are qualified for the 1992-1993 school year, please feel free to apply for them if you desire.
>
> If you have questions regarding this temporary employment, please feel free to contact me. If you agree with the position as indicated, please complete and return one copy of this letter.

Level II, School Exhibit #1.

3. At the bottom of the same letter, Grievant dated and signed her name below the following paragraph:

> I do hereby accept employment as a Language Arts/Foreign Language Teacher at the School for the Blind from
>
> September 21, 1992 to June 15, 1993 at an annual salary rate of $33,877. I understand that this is only temporary employment.

Emphasis in original.

4. For the 1993-94 school year, the second continuous year, Grievant was hired for the same

position. She had to reapply for the position, received a similar letter as the one reproduced in Finding of Fact #2, and signed and dated below an almost identical paragraph as reproduced in Finding of Fact #3.

5. For the 1994-95 school year, the third consecutive year, Grievant was hired for the same position. She had to reapply forthe position, received a similar letter as the one reproduced in Finding of Fact #2, and signed and dated below an almost identical paragraph as reproduced in Finding of Fact #3.

6. On July 24, 1995, Grievant reapplied for the same position for the 1995-96 school year. Once again she received a similar letter as the one reproduced in Finding of Fact #2, and signed and dated below an almost identical paragraph as reproduced in Finding of Fact #3. However, this was the only year Respondent did not have Grievant sign a "formal" contract. Instead a hand-written piece of paper was placed in her employment file. This unsigned document, dated 08-95, read: "Do not send contract for 1995-96[.] Letter was sent and will serve as contract."

7. Each year Respondent posted/advertised the position in question.

8. Grievant initiated this grievance after she received the following letter, dated March 20, 1996, from Max D. Carpenter, Superintendent:

> This is an official reminder that your temporary employment as a Language Arts Teacher at the School for the Blind will terminate June 15, 1996.
>
> We do want you to know that we appreciate the contribution which you have made to your Department during this year. We trust that you have found your duties and responsibilities interesting and rewarding.
>
> As positions are advertised, we invite you to apply for any in which you have an interest and for which you are qualified.
>
> Again, we wish to express our appreciation to you for your interest in our students and we wish you well in your future endeavors.

Level II, Grievance exhibit #8. 9. Each of the four years Grievant entered into a contract with Respondent she understood that she was a temporary employee.

10. After the first year, the 1992-93 school year, Grievant understood her employment was

temporary because the regular teacher, Ms. Mary Zeppuhar, (See footnote 1) was pursuing a doctorate degree. Level II Transcript at 27.

11. On August 14, 1992, Respondent approved a one year paid sabbatical (See footnote 2) for Ms. Zeppuhar from August 16, 1992, through August 15, 1993.

12. On August 13, 1993, August 12, 1994, and May 11, 1995, Respondent granted Ms. Zeppuhar a one year unpaid leave of absence for the 1993-94, 1994-95, and 1995-96 school years, respectively.

DECISION

Grievant asserts that she was unlawfully terminated, without notice by Respondent, and that after the third year of employment she should have been given a continuing contract pursuant to W. Va. Code §18-17-8. That Code Section provides, in pertinent part:

> Before entering upon their duties, all teachers shall execute a contract with the state board of education, which contract shall state the salary to be paid and shall be in the form prescribed by the state superintendent of schools. Every such contract shall be signed by the teacher and by the president and secretary of the state board of education.
>
> A teacher's contract, under this section, shall be for a term of not less than one nor more than three years; and if, after three years of such employment, the teacher who holds a professional certificate, based on at least a bachelor's degree, has met the qualifications for the same, and the board of education enter into a new contract of employment, it shall be a continuing contract.

However, in this instance W. Va. Code §18-17-8 is not applicable or triggered because Grievant understood she was a temporary employee filling in for another teacher on leave. Each year the position in question was posted, Grievant applied, Grievant was hired, Grievant was told her services were needed only for one year, and that the position was temporary. Grievant understood the nature of her employment. Grievant never testified that Respondent promised her, or led her to believe, that she would receive a continuing contract for the position in question. Grievant merely hoped that she would be able to remain. (Level II Transcript at 16). Therefore, it is erroneous to rely on W. Va. Code §18-17-8 when Grievant held only a temporary contract.

Furthermore, Grievant was not terminated. She was employed in a temporary position on a yearly basis. Her contracts expired naturally at the end of each year, pursuant to its terms. Superintendent Carpenter's letter, dated March 20, 1996, was not a termination letter. That letter was merely a

reminder that the contract between Grievant and Respondent would expire upon the endof the school year. Moreover, each year Grievant was encouraged to apply for other vacancies which might occur during the school year. Therefore, Grievant was not denied due process under the Code for lack of a "termination" hearing. See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

Teachers on sabbatical leave are protected. Respondent's Sabbatical Leave Policy, Policy 5530, Section 5.3 provides:

> While on sabbatical leave, employees shall be deemed to be employed full-time for the purposes of years of experience, accumulation of seniority, participation in the Teachers Retirement System and the Public Employees Insurance Program. Employees who are on sabbatical leave shall be reported to the state board of education on the personnel services report and their positions can be counted up to one-half full-time equivalent in the school foundation support program. Employees returning from leave shall be assigned to the same position from which they left unless another assignment is agreed to by both parties. In no case may an assignment be made which would invalidate the employee's certification status or bring about a demotion in position or salary.

Teachers on a leave of absence are also protected under W. Va. Code §18A-2-2a(a). It provides:

> Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence. Such teacher shall retain all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall have all rights and privileges generally accorded teachers at the time of the reemployment.

Therefore, based on W. Va. Code §18A-2-2a(a) and Respondent's Sabbatical Leave Policy, Policy 5530, Section 5.3, it is clear that the position of one on sabbatical leave or a leave of absence is protected.

At this point in the analysis, several rules should be kept in mind. A basic canon of statutory interpretation requires Code Sections be read together, and not interpreted as isolated pieces of legislation. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." (See footnote 3) Syl. Pt. 7, Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775 (W.Va. 1992); Syl. Pt. 3, Smith v. Bd. of Educ. of County of Logan, 176 W.Va. 65, 341 S.E.2d 685 (1985). Lastly, personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard pronounced in Dillon v. Board of Educ., 351 S.E.2d 58 (W. Va. 1986). See Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995).

Therefore, even though Grievant signed three one year contracts with Respondent, and worked a fourth year without signing a contract, she is not entitled to the relief she seeks. During the first year, the 1992-93 school year, Ms. Zeppuhar's position was clearly protected by Respondent's Sabbatical Leave Policy, Policy 5530. During the second year, the 1993-94 school year, her position was clearly protected by W. Va. Code §18A-2-2a(a). Therefore, Grievant has not accrued any "continuing contract status" rights to this point. From this point, Grievant onlyworked two additional years, one with a "formal" contract, the 1994-95 school year, and one without a "formal" contract, the 1995-96 school year. (See footnote 4) Even if Respondent had issued Grievant a contract for the fourth year, two years of professional employment (1994-95 and 1995-96) does not entitle her to a continuous contract.

Each year that Grievant agreed to teach for Respondent, she understood that it was a temporary, one year position. That is the extent of her rights of employment with Respondent. Grievant cannot "bootstrap" her way into a continuous contract with Respondent. To allow her to do so would not only violate the Code, canons of statutory interpretation, and precedent, but would also be in direct violation of the terms of the contract Grievant and Respondent entered into in good faith. Regardless, Grievant failed to prove Respondent acted arbitrarily or capriciously in not issuing her a continuing contract. Grievant also failed to provethe allegations in her grievance by a preponderance of the evidence. Grievant's employment status ended when her contracted expired.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. A state board of education employee may participate in the grievance procedure set forth in W.Va. Code §§ 18-29-1, et seq.

2. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

4. Grievant's contract of employment expired under its own terms as contemplated by the parties when the 1995-96 school year ended. See Trickett, supra; Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

5. Grievant failed to prove by a preponderance of the evidence that she was entitled to a continuous contract with Respondent as a matter of law.

Accordingly, this grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Hampshire 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.

Dated: 9/23/96 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Ms. Mary Zeppuhar's name was previously Mary E. Ayers. Some exhibits refer to her as Mary E. Ayers.

Footnote: 2 Respondent's Sabbatical Leave Policy, Policy 5530, Section 5.4 provides:

> *Employees receiving sabbatical leave shall be required to return to employment by the board which granted the leave for a period of at least one year for each year on leave or repay the compensation and benefits received during that time and have deducted the retirement credit and years of service credit accrued during the sabbatical leave.*

Footnote: 3 W. Va. Code §18-2-11, entitled: Sabbatical leaves for teachers and certain aides, provided, in pertinent part:

> *The state board shall by the first day of December, one thousand nine hundred eighty-eight, establish by policy a sabbatical leave program.*

Footnote: 4 Grievant did not allude to any, and the Undersigned does not know of any, Code Section which requires a contract to be issued to a teacher filling in for a teacher on sabbatical or on a leave of absence. W. Va. Code §18A-2-3 does not require Respondent to issue a contract. It provides:

> *The county superintendent, subject to approval of the county board, shall have authority to employ and assign substitute teachers to any of the following duties: (a) to fill the temporary absence of any teacher*

or an unexpired school term made vacant by resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher.