

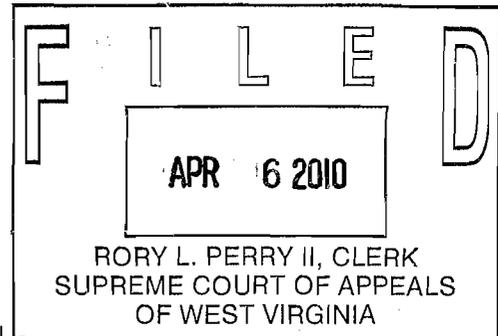
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NANCY JAMISON,
Appellant,

v. Appeal No. 35498
Civil Action No. 08-AA-119

THE BOARD OF EDUCATION OF
THE COUNTY OF MONONGALIA,
Appellee.

BRIEF FILED ON BEHALF OF APPELLANT NANCY JAMISON



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I. Procedural History

Appellant initiated the present grievance at level I pursuant to West Virginia Code §6C-2-1, et seq., seeking reimbursement for travel expenses on September 4, 2007 for both the 2006-2007 and the 2007-2008 school years. Dr. Louis Hlad, the designee of the chief administrator, conducted a hearing at level I on October 31, 2007 by agreement of the parties. Dr. Hlad denied the grievance at level I by decision issued November 20, 2007. As a consequence of a mislabeled envelope, counsel for Appellant did not receive the decision until November 30, 2007, when a facsimile copy was received.

Appellant appealed to level II on November 30, 2007. The parties requested a waiver of mediation at level II. The grievance board granted this request and the grievance proceeded to level III.

Administrative Law Judge Denise Spatafore conducted an evidentiary hearing at level III on March 13, 2008 to supplement the record created at the lower level of the grievance procedure. By decision dated August 27, 2008 and received August 28, 2008, the administrative law judge denied the grievance. Appellant filed an appeal to Kanawha County Circuit Court pursuant to West Virginia Code §6C-2-5 on September 29, 2008.

By order entered August 27, 2009 and filed the next day, the circuit judge affirmed the decision of the administrative law judge. Appellant seeks reversal of this order by the West Virginia Supreme Court of Appeals by the instant appeal.

II. Statement of Facts

Nancy Jamison, Appellant, is currently employed as a secretary. The Board of Education of the County of Monongalia, Appellee, is a quasi-public corporation created for the management and control of the public schools of Monongalia County.

Appellant is assigned to work at two different locations, Brookhaven Elementary School and Cheat Lake Middle School. She works 1/2 of her scheduled workday at one of the locations and 1/2 of her scheduled workday say at the other location. When Appellant finishes her assignment at the one school she drives to the other and finishes her daily schedule there. Compensation for the travel between these two work locations is the subject matter of this grievance/appeal.

Prior to her present assignment, Appellant worked 1/2 of her workday at Cheat Lake Middle School and the other 1/2 at the Central Annex Building. Appellant was placed at Brookhaven Elementary School when her prior assignment at the Central Annex ended as the result of the termination of a federal grant. Appellant did not request assignment to or bid upon placement at Brookhaven. Appellee simply assigned Appellant to that location. (Appellant continued to work 1/2 of her workday at Cheat Lake Elementary School.

Monongalia County File 7-26 (Employee Travel) provides, in pertinent part, the following:

Travel within the County
Certain Board of Education employees are authorized an allowance for travel in their own private vehicles, when traveling from workstation to work station on official duty. It is the employee's responsibility to report to work on his/her own and he/she goes home on his/her own, but official travel during the between workstations is made on a reimbursable basis.

From time to time, there may be a special instructional program requiring home visits and/or other special travel. The approval of the program will also authorize the approval of reimbursable travel. Generally, reimbursement for meals and/or lodging within the county will not be allowable. The Superintendent may make exception.
(Emphasis Added)

For the six years prior to the 2005-2006 school year, Appellee reimbursed Appellant for travel expenses incurred in traveling from one of her work sites to the other work site. Appellee altered this practice and denied Appellant compensation for mileage for the 2005-2006 school year. Appellant grieved that refusal. The grievance was denied at level IV and an appeal to circuit court is currently pending. By letter dated August 27, 2007, counsel for Appellant inquired as to whether Appellee intended denying mileage compensation for the 2006-2007 and for the 2007-2008 school year. Upon receiving an affirmative response, the present grievance was initiated at level I pursuant to West Virginia Code §6C-2-1, et seq., seeking reimbursement for travel expenses on September 4, 2007 for both the 2006-2007 and the 2007-2008 school years.¹

III. Issues Raised

- i. Did the administrative law judge and circuit court err in holding that Appellant was not a full time employee and that she had bid upon those two locations that make up her current work sites?

¹ By agreement of the parties, the grievance was bifurcated into a grievance concerning the 2006-2007 school year and one concerning the 2007-2008 school year. The former was put into abeyance pending the result of Appellant's appeal of the level IV decision concerning mileage compensation for the 2005-2006 school year. In the level IV decision the administrative law judge indicated that this procedure was improper and she ruled on both school years.

- ii. Did the administrative law judge and circuit court err in holding that Appellant is not entitled to mileage expenses for travel between her two work stations pursuant to county policy on "Employee Travel", i.e. Monongalia County File 7-27?

- iii. Did the administrative law judge and circuit court err in holding that Appellant is not entitled to mileage expenses for travel between her two work stations pursuant to West Virginia Code §18A-2-14?²

IV. Citation of Authority

- A. West Virginia Code §6C-2-5
- B. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989)
- C. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399 (W.Va. 1995)
- D. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979)
- E. West Virginia Code §18A-4-8a(1)
- F. West Virginia Code §18A-4-8a
- G. West Virginia Code §18A-4-8h
- H. West Virginia Code §18A-2-14
- I. Sexton v. Boone County Board of Education, Docket No. 94-03-044, West Virginia Education and State Employees Grievance Board (June 22, 1994)

² This section was in effect for the 2007-2008 school year, but not the preceding school year. The section provides, "A county board shall reimburse any school personnel for each mile traveled when the employee is required to use a personal motor vehicle in the course of employment. The county board shall reimburse at the same rate for all employees in that county. The rate of reimbursement shall be at least the lesser of, and not more than the greater of, the federal standard mileage rate and the rate authorized by the travel management rule of the Department of Administration.

J. State v. Elder, 165 S.E.2d 108 (W. Va. 1968)

V. Argument

Prior to addressing the issues peculiar to this case, Appellant will address two general issues common to all administrative appeals from the a circuit court order reviewing a decision of the West Virginia Public Employees Grievance Board. The first of these issues is the standard of review that this court must apply to this case. The second is the statutory construction to be applied to school personnel laws.

▪ STANDARD OF REVIEW

This appeal is controlled by West Virginia Code §6C-2-5. The language of this provision is virtually identical to the language formally found in West Virginia Code §18-29-7, which related to appeals to circuit court of grievance board decision by administrative law judges under the previous statutory grievance procedure. As a consequence of this affinity, case law interpreting West Virginia Code §18-29-7 is applicable to West Virginia Code §6C-2-5.

In construing the former section of law the West Virginia Supreme Court of Appeals held that the standard of review is two fold. First, judicial review of a decision on factual issues is similar to the standard of review under the Administrative Procedure Act, § 29A-5-4, in that both require that evidentiary findings made at an administrative hearing not be reversed unless these findings are clearly wrong. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989) On legal issues or the application of the law to facts, decisions are reviewed *de novo*. Martin v. Randolph County Bd. of Education, 465 S.E.2d 399 (W.Va. 1995)

- STATUTORY CONSTRUCTION

The long-standing rule regarding statutory construction of laws and regulations dealing with school personnel is that such laws and regulations are to be strictly construed and in favor of the employee(s) that the law or regulation is designed to protect. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

Now let us proceed to the specific issues raised by this appeal.

- APPELLANT IS A FULL TIME EMPLOYEE AND DID NOT BID UPON HER CURRENT ASSIGNMENT.

Appellant's assertion that she is not some kind of "1/2 time employee times two", but rather a full time employee is based on law rather than fact. It is undeniable that she works roughly 1/2 of her scheduled day at one location and the other 1/2 at another location. Legally speaking, though, the distinction between an employee holding two 1/2 time positions and holding one full time position with two work sites is not particularly well founded under the law.

West Virginia Code §18A-4-8a(1) provides:

The minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the State Minimum Pay Scale Pay Grade I and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the State Minimum Pay Scale Pay Grade I set forth in this section

Notably, this statutory language does not refer to 1/2 or full time employees. Rather it states that employee working less than 3 1/2 hours per day receives one-half of the state minimum salary and an employee who works in excess of 3 1/2 hours per day is

entitled to the full state minimum salary. Application of this language/definition to Appellant indicates that she is or is equivalent to a full time employee as she works seven hours daily.

Appellant does not intend to mislead this court, though. The matter is not completely clear as West Virginia Code §18A-4-8h does allude to possession by a school service employee of two 1/2 time positions. However, this does not mean that such an employee, one who holds two 1/2 time positions, would not be considered for all purposes as a full time employee. Further, it is noteworthy that West Virginia Code §18A-4-8(j) provides:

Notwithstanding any provision in this Code to the contrary, and in addition to the compensation provided for service personnel in section eight-a [18A-4-8a] of this article, each service person is, entitled to all service personnel employee rights, privileges and benefits provided under this or any other chapter of this Code without regard to the employee's hours of employment or the methods or sources of compensation.

This indicates that all school service employees who have regular contracts of employment are entitled to the same rights privileges and benefits. Therefore, an employee who works less than 3 1/2 hours per day, call the employee 1/2 time if you wish, is entitled to the same benefits as an employee who works more than 3 1/2 hours per day. The only difference is the former is entitled to 1/2 the minimum monthly salary specified in West Virginia Code §18A-4-8a and the latter to the full amount. An employee who works more than 3 1/2 hours per day at two locations has a greater claim to equal treatment with an employee working more than 3 1/2 hours at single location than does an employee working less than 3 1/2 hours.

In view of the foregoing, making any sort of distinction between a "full time employee" and an employee with two 1/2 time positions is silly. However, Appellee's arguments and the basis for the administrative law judge's decision depend on this distinction. If Appellant is held to be a full time employee, plain and simple, the Appellee's case and the administrative law judge's decision collapse *ab initio*. Appellant simply wins.

In prior grievance board decisions the question of whether an employee is full time or holds two 1/2 time positions was not held to be important. The argument that an employee with two 1/2 time positions is treated differently than a full time employee assigned to two different locations during the work day, was rejected in Sexton v. Boone County Board of Education, Docket No. 94-03-044 (June 22, 1994). (A copy of Sexton was attached to the brief before the circuit court.)

Notably, Sexton involved circumstances similar to those in the current appeal and also involved the issue of the employee's entitlement to mileage expenses. The employee in Sexton prevailed, in part, because the employee had been assigned to two different locations by the board of education through the transfer process and did not, himself, seek out that arrangement. One should note, that though the employee was placed on the transfer list involuntarily, he utilized the bidding process to select his second work site.

Appellant's situation is similar to that of the employee in Sexton, in that her current two work assignments resulted from a realignment of staff undertaken by the employer. The administrative law judge erred in holding that Appellant had bid upon both of her current locations/assignments. It is true that Appellant originally bid upon the Cheat Lake Middle School and Central Annex Building locations. However, she did not bid on the

assignment to Brookhaven Elementary School. Appellant was placed at Brookhaven Elementary School when her prior assignment at the Central Annex ended as the result of the termination of a federal grant. Like the employee in Sexton, she retained employment for roughly 1/2 a day at one location and was placed on the transfer/unassigned list for subsequent assignment for the other 1/2 day. The only difference in the process was that Appellant was assigned to a new location for 1/2 of her scheduled workday, whereas the employee in Sexton chose the other work site by the bidding process. This difference is slight and does not justify treating Appellant as if she "waived" the right to mileage expense compensation. Such a waiver, if it can be inferred at all, would seem to apply equally to the employee in Sexton. The employee in Sexton at least had a greater ability to try to find another work site close to his original one to minimize the mileage expenses if indeed he was to bear them. In the current case, it was Appellee that chose Brookhaven as the second work site and not Appellant.

- APPELLANT IS ENTITLED TO MILEAGE EXPENSES PURSUANT TO APPELLEE'S COUNTY POLICY.

As indicated above, Appellee's own policy, Monongalia County File 7-26 (Employee Travel) provides, in pertinent part, the following:

Travel within the County
Certain Board of Education employees are authorized an allowance for travel in their own private vehicles, when traveling from workstation to work station on official duty. It is the employee's responsibility to report to work on his/her own and he/she goes home on his/her own, but official travel during the between workstations is made on a reimbursable

basis. From time to time, there may be a special instructional program requiring home visits and/or other special travel. The approval of the program will also authorize the approval of reimbursable travel. Generally, reimbursement for meals and/or lodging within the county will not be allowable. The Superintendent may make exception.
(Emphasis Added)

Appellee is under obligation to comply with the policy. The West Virginia Supreme Court of Appeals has held that an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. The fact that a regulation may be generous beyond statutory or constitutional requirements does not preclude an employee from availing herself of the rights provided by the procedure set out in the regulation. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

Under the provisions of the Appellee's own policy, Appellant is entitled to mileage for travel between two work sites during the workday. The policy makes no exception for an employee who holds two 1/2 time positions as opposed to one full time position. While a administrative body's own interpretation of its policies must be given some deference, such deference does not extend to ignoring the policy as written nor to adding exceptions not spelled out in the policy. Further, Appellee interpreted its policy to require payment of mileage expenses to Appellant for a period of six years! The policy didn't change. Appellee merely changed its mind on how the policy would apply. A careful reading of the policy provides no support for Appellee's change in application.

- APPELLANT IS ENTITLED TO MILEAGE EXPENSES PURSUANT TO WEST VIRGINIA CODE §18A-2-14.

West Virginia Code §18A-2-14 was enacted in the spring of 2007 and was applicable to the 2007-2008 school year. It provides:

A county board shall reimburse any school personnel for each mile traveled when the employee is required to use a personal motor vehicle in the course of employment. The county board shall reimburse at the same rate for all employees in that county. The rate of reimbursement shall be at least the lesser of, and not more than the greater of, the federal standard mileage rate and the rate authorized by the travel management rule of the Department of Administration.

The language of West Virginia Code §18A-2-14 is quite clear. Anyone who uses his or her personal automobile in the "course of employment" is entitled to compensation for mileage expenses. Traveling between the two work sites is clearly within the course of Appellant's employment. There statute contains no exception for employees who hold two 1/2 time positions rather than a single full time position, to the extent that such a thing is possible.

Strict construction of this statute in favor of Appellant is hardly required to reach the conclusion that Appellant is entitled to mileage compensation. Simple application of the language is sufficient. In that regard, the West Virginia Supreme Court of Appeals has held that where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Syllabus Point 2, State v. Elder, 165 S.E.2d 108 (W. Va. 1968). Hence, creating an exception to the language in West Virginia Code §18A-2-14 for employees holding two 1/2 time positions is extremely inappropriate.

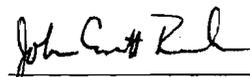
Arguably Appellee's interpretation of its own policy is entitled to some deference. However, Appellee's interpretation of the state code is entitled to no such deference. The same is true of the interpretation of the administrative law judge. The review of her decision on legal issues is a *de novo* review. It is hard to imagine a disinterested

and unbiased reading of the statutory language that does not result in decision favorable to Appellant. Nevertheless, the administrative law judge found a way. Appellant humbly urges this court to reverse that decision on the basis of a common sense application of the language of Appellee's own policy and West Virginia Code §18A-2-14.

VI. Conclusion

Appellant asserts that she is entitled to compensation for mileage expenses for the 2006-2007, 2007-2008 and future school years based upon state law and county policy.

NANCY JAMISON, Appellant
By counsel,



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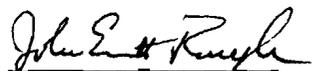
CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for Appellants, hereby certify that I have served the original and nine copies of the foregoing "Brief Filed on Behalf of the Appellant Nancy Jamison" on the following by hand-delivery, on this the 6th day of April 2010, to:

Rory Perry, Clerk
West Virginia Supreme Court of Appeals
1900 Kanawha Boulevard East
Room E-307, State Capitol
Charleston, WV 25305

Further, I, John Everett Roush, Esq., counsel for Appellant, hereby certify that I have served a true copy of the foregoing "Brief Filed on Behalf of Appellant Nancy Jamison" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 6th day of April 2010, to:

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