JEANETTE AMERDES

v. Docket No. 93-15-209

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

At the time this grievance arose during the 1991-92 school year, Grievant Jeanette Amerdes was employed by Respondent Hancock County Board of Education (HCBE) as a school bus aide under a seven and one-half hour (daily) contract. At that time, she normally had only morning and afternoon duties on the school bus. The question presented in this grievance is whether HCBE should have employed Grievant, the most senior applicant, for a separate midday assignment, despite the fact that the addition of the assignment in Grievant's schedule would have extended her work week beyond forty hours and required HCBE to pay her overtime wages. Grievant sought the position and/or lost wages.

Due to the passage of time, the only relief now available would be an award of lost wages. In order to explain this situation, some background information about the procedural aspects of the case is necessary. A written level one grievance on this matter was filed October 16, 1991 and denied onOctober23, 1991. Grievant appealed and a level two hearing was held March 2, 1992. (See footnote 1) Grievant appeared at that proceeding with her attorney and several witnesses.

Of record is an undated level two decision, presumably rendered within weeks of the level two hearing, which was adverse to Grievant, and the April 13, 1992 level three decision which states, "[HCBE] waives consideration of the grievance to Level IV - the state hearing officer." Grievant apparently believed said decision perfected her appeal to level four and waited for the grievance process to continue. However, through counsel she eventually filed a level four appeal with the West Virginia Education and State Employees Grievance Board on or about June 10, 1993.

A hearing was set and continued by the parties. A second hearing date was cancelled when the parties determined that a decision could be based on the record adduced below, although Grievant's counsel indicated that he may want to file a brief after he had reviewed the level two hearing transcript. In March 1994, HCBE transmitted a copy of the transcript to the undersigned; it is presumed that Grievant's counsel also received a copy. By letter dated May 3, 1994, the parties were advised that they must file fact/law proposals by May 18, 1994. Grievant's counsel filed at the

designated time; HCBE apparently waived.

Grievant argued at level two that there are no laws, regulations or policies which would preclude HCBE from granting extra, long-term work to an employee even if overtime would result. (See footnote 2) She also relied on a portion of W.Va. Code §18A-4-8a which states:

No service employee shall have his or her daily work schedule changed during the school year. . ., and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Finally, Grievant argues in her level four brief that HCBE abused its discretion when it denied her the assignment and/or when it failed to grant her request to share the assignment with the successful applicant. (See footnote 3)

HCBE denies wrongdoing in this matter. It argues that the statute relied upon by Grievant is not applicable to this situation because, in fact, Grievant's work hours have not been altered. HCBE reasons that Grievant did not hold the postedposition at issue at the start of the year, and her daily schedule was not changed in order to prevent overtime wages or for any other reason.

Based on all matters of record, it is determined that Grievant has not established a legal entitlement to the job in question. In general, school laws are designed to protect the workers' interests with respect to their basic or regular employment. While these laws do address matters pertaining to occasional or more long-lasting additional assignments, no worker is guaranteed either occasional or long-term additional work beyond his or her regular employment. See Smith v. Ohio County Bd. of Educ., Docket No. 92-35-428 (Apr. 16, 1993).

The Grievance Board has held that a board of education may exercise its discretion and balance the desire of its employees to attain long-term extra work with the needs and goals of the school system, fiscal and otherwise. See Eastham v. Cabell County Bd. of Educ., Docket No. 92-06-397 (Apr. 16, 1993). It has also been held that a board of education is not required to retain unnecessary extra jobs or give one employee multiple long-term driving assignments to the exclusion of other drivers. Smith, supra; Stafford v. Hancock County Bd. of Educ., Docket No. 91-15-382 (Sept. 30, 1992). Finally, it has been ruled that a board of education does not have to award an extra job to the most senior bidder when to do so would be contrary to the interests and safety of the school children involved or similar reasons. Schleicher v. Ohio County Bd. of Educ., Docket No. 92- 35-429 (Apr. 16, 1993). The grievant in Schleicher held a nine-hour daily (regular) contract driving a bus for

handicapped students and was the most-senior bidder for an additional daily supplemental run. While the employer awarded the job to another driver for safety reasons, implicit in its decision-making process was a consider ation of the additional financial obligations it would incur in the form of time-and-a-half overtime wages.

In light of the aforementioned cases and other law in effect at the time this grievance arose, Grievant had the burden of proving by a preponderance of the evidence that HCBE abused its discretion in this matter. This she failed to do.

It is noted that during the 1994 legislative session, lawmakers amended W.Va. Code §18A-4-16, effective thirty days after its passage on March 10, 1994. This statute addresses certain particulars with respect to the employment of school personnel for extracurricular assignments. Extracurricular duties are defined as

any activities that occur at times other than regular ly scheduled working hours, which include the instruc tion, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

Historically, county boards of education have employed bus operators for work that is in addition to their regularly-sched uled daily driving and beyond their contracted workday through "supplemental" assignments or through extracurricular contracts under Code §18A-4-16. The amendment to §18A-4-16 added subsec tion 5:

The board of education shall fill extracurricular and supplemental school service personnel assignments andvacancies in accordance with [W.Va. Code §18A-4-8b]: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

Obviously, how Grievant's case would have fared under the amendment need not be reached here.

In addition to the foregoing, the following formal findings of fact and conclusions of law are appropriate.

Findings of Fact

1. During the 1991-92 school year, Grievant was one of five bus aides employed by HCBE. More specifically, she was one of two bus aides who were assigned to the transportation depart

ment's Weirton, West Virginia, bus garage for the 1991-92 school year.

2. During the 1991-92 school year, Grievant worked under a seven and one-half hour daily contract, or thirty-seven and one-half hours per week, the "largest" aide's contract in the county. T.55.

3. In the early part of the 1991-92 school year, HCBE posted a one hour per day, four day per week bus aide's position for a pre-school, midday run for the Weirton bus garage.

4. Grievant and the other Weirton-based aide, Pat Seders, applied for the posted one-hour position.

5. Although Ms. Seders, with six or seven years' tenure, was less senior than Grievant, the job was awarded to Ms. Seders in order to avoid the accumulation of overtime hours with respect to Grievant's work week. 6. When Grievant learned that Ms. Seders won the bid, she told the transportation supervisor that she was willing to divide the run with Ms. Seders so as to avoid the overtime situation. She based this request on the fact that she had been permitted in the past to share a different job with Ms. Seders.

7. The transportation supervisor was unwilling to divide the work on this occasion because the prior job was an unposted one, and the aide assignment in question had been officially posted and already awarded.

8. HCBE pays overtime when service employees' work week exceeds forty hours. Most typically, this occurs when bus operators who are interested in extra-duty work under Code §18A- 4-8 have been assigned, on an occasional, rotating basis, to perform after school, extra-duty bus driving. Permanent, on- going "midday" or "supplementary" runs are not awarded to employees whose work contract already nears or reaches the eight hour per day mark. T.62-63, 76-77.

Conclusions of Law

1. 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, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Board of Education, 351 S.E.2d 58 (W.Va. 1986).

2. During the 1991-92 school year, the time this griev ance arose, boards of education were not required to fillsupplemental service assignments pursuant to Code §18A-4-16 or on the basis of seniority under Code §18A-4-8b.

3. Grievant has failed to demonstrate any violation of law, regulation or policy in this matter.

4. Grievant did not establish she was legally entitled to the aide assignment in question or otherwise prove by a prepon derance of the evidence that Hancock County Board of Education abused its discretion in not awarding her the aide assignment.

Accordingly, the grievance is **DENIED**.

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

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NEDRA KOVAL

Administrative Law Judge

Date: May 26, 1994

Footnote: 1 The record is silent as to why so much time elapsed between levels one and two.

Footnote: 2 During the period in question, Grievant had attained approximately twenty years' seniority with HCBE. While in past years she had not been particularly interested in extra work, in recent years she became highly desirous of extra work and wages in order to enhance her retirement benefits.

Footnote: 3 In her level four brief, Grievant cited some case law which discuss a board of education's discretion in employment matters. However, those cases involved hiring determinations relative to the full-time, regular employment of professional employees under a "most qualified" standard. Service personnel are qualified for a position when they hold the class title or pass a competency test; they are not hired for regular employment on the basis of the most qualified applicant.