WALLACE McMILLIN and BETTY COLVIN

v. Docket Nos. 93-15-366/467

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants Wallace McMillin and Betty Colvin, employed by Respondent Hancock County Board of Education (HCBE) as bus operators, claim they were not adequately paid for bus driving assignments during Summer 1993. They desire a full day's wages at their regular salary rate, instead of the $8.00 per hour they were paid for their actual work time, and back wages. HCBE counters that Grievants accepted a posted position which set forth an hourly salary and that the compensation for bus driving was controlled by monies from a private-sector entity which funded the summer program. (See footnote 1)

The underlying facts which gave rise to this controversyare not in contention. At some point during the 1992-93 school year, an administrator at HCBE's Vocational-Technical Center (Vo-Tech) wrote a grant proposal for funding to provide remedial instruction for at-risk students during a portion of the coming summer. The Northern Panhandle Private Industry Council (PIC) awarded a grant for the summer program. Classes were scheduled for three days per week at Vo-Tech for six weeks, from approxi mately mid-June to early August.

Bus operators were needed to transport the Vo-Tech stu dents. To meet that need, HCBE posted summer school bus opera tor position vacancies at the bus garage and other sites in the school system where summer jobs are posted. The posting re vealed that the Vo-Tech work entailed four hours per day for three days each week at an hourly rate of $8.00. Grievants, who held the positions the prior year, were given first preference and were ultimately hired for summer-school driving positions on the basis that they held the jobs the previous year.

Notwithstanding PIC's funding, HCBE administered the summer school program and the funds and provided the facility and classrooms as well as school bus transportation. Professional and support personnel were HCBE staffers. For example, Charles Pugh, HCBE's transportation director, was Grievants' immediate supervisor during the summer. Grievants each drove one of HCBE's school buses, fueled and serviced by HCBE's personnel using HCBE's facilities, and kept milage and fuel records, at Mr. Pugh's request.

At issue in this case is whether Grievants were entitled totheir regular contract rates as payment for their summer driv ing. For the purpose of this grievance, Grievants were summer school employees of HCBE during Summer 1993. (See footnote 2) Moreover, their complaints about their summer wages have some validity. In short, Grievants are entirely correct that they are entitled to be paid summer wages on the basis of their regular employment rate. HCBE properly established a summer school program for remedial instruction as provided in W.Va. Code §18-5-39. Notably, while Code §18-5-39 permits boards of education to establish tuition charges and to provide tuition reductions or free summer enrollment for needy students, the statute makes no mention of funding sources for summer school, including whether or not grant-funded summer school programs are excluded from the statute's requirements.

However, HCBE apparently recognized that, regardless of the funding source for its summer remedial program, it was bound by the "seniority" provisions of the statute with respect to the reemployment of former summer service personnel. Code §18-5-39 ¶6 provides: "An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such position exists during any succeeding summer." HCBE dulyoffered Grievants the summer school jobs in Summer 1993 that they held in Summer 1992. Therefore, it is utterly incomprehen sible that HCBE failed to heed the last sentence in Code §18-5- 39 ¶6: "The salary of an employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed."

Subsequent to the level four hearing, HCBE cured this error. According to a March 10, 1994 letter filed by Grievant McMillin's counsel, HCBE tendered payment representing the difference between the posted hourly amount and Grievant McMillin's regular rate. (See footnote 3) Accordingly, this portion of the grievance has been granted.

The remaining issue herein is whether Grievants were entitled to a full day's wages for four hours' work. Their arguments in support of the contention are rejected. First of all, reliance upon W.Va. Code §18A-4-8 is misdirected. That statute states, in part, "Service personnel employed in the same classification for more than the two hundred day minimum employ ment term shall be paid for additional employment at a daily rate of not less than the daily rate paid for the two hundred day minimum employment term." Clearly, this proviso speaks to extended regular employment, not summer school employment. Administrative notice can be taken that many boards of education hire

210-, 220-, 240- and/or year-round, 260-day service employ ees. These employees perform the same basic duties in thesummer months as they do the other ten months of the year when school is in session and cannot be construed as "summer school" employees. Code §18A-4-8 simply insures that extended regular employment is adequately compensated.

Likewise, the citation to and reliance upon W.Va. Code §18A-4-8a is not supportive. Code §18A-4-8a's provision that "the minimum monthly pay for each employee whose employment is for a period of three and one-half hours a day shall be at least the amounts indicated in the 'state minimum pay scale grade'" is also not applicable to summer school employment. The three references to "employment term" or "full employment term" in the same paragraph of this portion of the statute clearly indicates that a determination of full-time or part-time employment for salary purposes pertains to the term of a service employee's contracted regular employment, not summer school employment, an entirely different matter.

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

Findings of Fact

1. In Summer 1993, Grievants worked approximately six weeks, for three days' per week and four hours' per day, trans porting students by bus to a remedial summer program funded by a grant but administered by HCBE.

2. At the time in question, Grievants were paid the advertised flat hourly rate for each hour they worked, instead of their regular hourly rates.

Conclusions of Law

1. Certified teachers who teach regular credit courses in a summer school program and support service personnel who perform duties relative to the summer school program must be compensated according to the rates in effect in that county for each particular type of employment. W.Va. Code §18-5-39.

2. In particular, under Code §18-5-39 ¶6: "An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such position exists during any succeed ing summer. . . .. The salary of an employee shall be in accordance with the salary schedule of persons regularly em ployed in the same position in the county where employed."

3. A board of education's grant-funded summer remedial education programs are not specifically excepted from the salary requirements of Code §18-5-39.

4. Grievants established that they are entitled to hourly wages for summer school bus driving duties based on their regularly-contracted hourly rate.

5. Service personnel who hold extended contracts of employment beyond "the two hundred day minimum employment term," must be paid for those additional days "at a daily rate of not less than the daily rate paid for the two hundred day minimum employment term." Code §18A-4-8.

6. A determination of full-time or part-time employment for salary purposes required by Code §18A-4-8, pertains to the term of a service employee's contracted regular employment, notto summer school employment.

7. Grievants failed to establish they were entitled to wages in excess of actual hours worked for summer school bus driving or to otherwise demonstrate a violation of law, regula tion or policy on HCBE's part with respect to this issue.

Accordingly, the grievance is **GRANTED** to the extent set forth above.

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 20, 1994

Footnote: 1 Adverse decisions were rendered at levels one and two on July 27, and November 4, 1993, respectively. Grievants thereafter appealed to level four. Grievant McMillin and his union counsel appeared at the January 26, 1994, level four hearing. Fact/law proposals were tendered by Grievant McMillin's counsel on March 14, 1994. HCBE apparently intends to stand on its level two decision.

Footnote: 2 HCBE asserted that the Grievance Board might not have jurisdiction in this case because of PIC's requirement that summer school employee grievances be heard by PIC. However, HCBE provided no documentation with

respect to this requirement. More importantly, Grievant testified without contradiction that he had not signed any contract of employment for his summer employment. Therefore, Grievant definitely did not enter into a work contract with PIC and was not bound by any PIC requirements regarding possible employee grievances.

Footnote: 3 It is presumed that HCBE also paid Grievant Colvin the appropriate amount of back wages.