ORVAL MILLER

v. Docket No. 94-30-1087

MONONGALIA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, a bus operator, filed this action after Respon dent Monongalia County Board of Education (MCBE) reduced his wages for driving a supplemental run without giving him any prior notice. MCBE claims the alteration of the wages was proper in light of agreements among drivers and MCBE as to adjustments when route changes occurred and because the time required to complete Grievant's route had decreased from the prior year. The case became mature for judgement on February 13, 1995, the agreed-upon cut-off date for submission of level four fact/law proposals/rebuttals.1

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1A level four hearing was conducted on December 20, 1994, at which time, the parties' agreed to merely supplement the lower-level record. That record consists of the decisions rendered at levels one through three on June 9, 1994, September 27, 1994, and November 16, 1994, respectively, and the transcript from the September 1, 1994 level two hearing. Only Grievant filed a level four brief on February 6, 1995.

The underlying facts in this case are not in contention.

In addition to Grievant's regular a.m. and p.m. runs, he has also held a midday extracurricular assignment (supplemental run for kindergarten and head start) for approximately five years. According to Grievant, the supplemental run was posted initial ly, and he won the bid as the most senior applicant. Thereaf

ter, the job was not posted, and Grievant retained the assign ment each succeeding year.

Over the years, Grievant received two hours' compensation per day for the supplemental run, although, according to him, the time actually required to perform the driving varied, sometimes more than two hours and sometimes less than two hours. Grievant essentially stated that some of the day-to-day time variations occurred simply because traffic was slow or because a parent was not present to pick up his or her child at the bus stop. In addition, year-to-year changes could occur if Grievant's route included three schools rather than two schools from which to pick up those students who attended a morning kindergarten session.

Prior to the beginning of the 1992-93 school year, MCBE's bus operators orally agreed to waive notice requirements with respect to changes in their driving schedules. The proposal came about because school construction and consolidations, changing locations for kindergarten classes and other factors created fluctuations in driving needs which would not be known until the beginning of each new school year. Essentially, this "waiver" permitted operators to keep their own bus runs from year to year without possible transfer actions and repostings due to significant route changes.

With respect to the 1993-94 school year, Grievant's supple mental route included only two schools. He testified at the level two hearing that, when the school year began, he serviced his bus for the mid-day run at about 10:40 a.m., departed from the bus garage at 10:45 a.m., and arrived at Suncrest school a few minutes past 11:00 a.m. The Suncrest students that Grievant was supposed to transport "came out about 11:15" a.m., Grievant

stated, and he thereafter departed for the other school. Grievant said he finished the run and usually returned to the bus garage by 12:30 or 12:40 p.m. and that he spent less than ten minutes to clean the bus. Grievant also stated that, in January 1994, one child moved away, eliminating about ten minutes from his driving time.2

The parties agreed that MCBE does not incorporate wages for supplemental runs in a bus operator's salary; rather, a compu tation is made for each day the operator actually completes the run and any wages due are added to the salary each pay period. Transportation officials stated that operators are allocated time to prepare their buses prior to beginning their supplemen tal run, but that no time is credited for post-driving clean up. Finally, testimony established that bus operators are required

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2MCBE apparently adjusts the drivers' routes/stipends only once after the school year begins. Thus, the fact that Grievant's driving time was altered in January 1994 has no bearing on the outcome of this case.

to submit some type of time sheet each year after the beginning of school to verify how long it takes to complete their supple mental run.

After the process of analyzing the supplemental runs was completed shortly after the 1993-94 school year began, at least six operators had their supplemental routes and compensation adjusted, either downward or eliminated altogether. However, Grievant indicated no change in his driving time from the prior 1992-93 school year (two hours).

Later, sometime in October 1993, transportation department

officials became aware that a driver with a midday kindergarten run who also left the bus garage for Suncrest School departed at 11:00 a.m., picked up the students at their 11:20 a.m. dismissal time, and completed a similar run altogether in one and one-half hours. After a determination was made that it should take only one and one-half hours to drive the Suncrest kindergarten run, MCBE reduced Grievant's compensation from two hours per day to one and one-half hours per day, effective October 21, 1993. Grievant was not notified of a possible reduction of his compen sation for the supplemental run at any time before October 21, 1993, nor was he notified of the actual reduction of his wages for the supplemental run on October 21, 1993 or thereafter, either orally or in writing.

Grievant testified that, because he had taken some sick leave during the school year, his paycheck varied from time to time. Consequently, he never noticed or inquired about a discrepancy in his wages for the supplemental run until May 1994. When school officials confirmed in May 1994 that his salary for the run had been reduced in October 1993, Grievant promptly initiated a grievance.

The grievance was denied at level one on the basis that it was untimely filed and because "grievant waived the job posting rights [for regular driving as well as supplementary driving] in 1992 until the construction program was completed." However, the level two grievance evaluator apparently rejected MCBE's timeliness defense. He decided that, based on the testimony, Grievant's run during 1993-94 took less than two hours but more than one and one-half hours, and, because time increments for pay purposes is based on fifteen minute allotments, Grievant was "eligible for fifteen minutes back pay for each day that he

drove his noon run last year after the date in question, offset by any required deductions." Grievant disagreed with this outcome and, following the level three affirmation of the level two decision, filed this appeal seeking two hours' pay for each run he completed after October 21, 1993.

Grievant's legal theories in this case are essentially based upon his assertion that midday supplemental assignments were not, to his knowledge, part of the bus operators' 1992 discussion or agreement about route changes. He then cites various statutes, namely, W.Va. Code 18A-2-6, 18A-2-7 and 18A-4-8, case law and Grievance Board decisions as support for the argument that MCBE could not reduce his salary for any purposes, absent compliance with statutory requirements in the Spring prior to the beginning of a new school year. The arguments are rejected, based on the undersigned's determination that MCBE's operators had agreed in 1992 to route and stipend adjustments for their supplemental runs on a year-by-year basis.3

Notably, Grievant did not call on any other operators to corroborate his assertions about the 1992 agreements. Moreover, Grievant offered no rationale as to why he and other bus opera tors were required to submit verifications after school began as to how long it took to complete a supplemental run. In fact, Grievant stated during the level two hearing that he had timely submitted his driving time for his supplemental run after the 1993-94 school year began. If it were true that an agreement did not exist between transportation officials and operators that routes and stipends could be altered after the school year began, then there would be no purpose for requiring the opera tors to verify the time they spent driving those runs.

However, MCBE is also bound by the 1992 agreements regard ing supplemental runs. Since Grievant was required to furnish

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3Grievant's level four brief contained the following arguments, among others:

1. A school service personnel may not be relegated to a condition of employment which lowers his compensation during a school year without his consent. W.Va. Code 18A-4-8.

2. In order to lower the compensation of a school service personnel for a future fiscal year it is necessary to terminate the employee's contract of employment pursuant to W.Va. Code 18A-2-6 [cites omitted].

Due to the findings herein relative to the operators' 1992 agreements, it is not necessary to analyze or discuss these or any of Grievant's legal theories.

verification of his work hours, MCBE was also duty-bound to notify Grievant that the driving time he submitted was being challenged. See Moore v. Ohio County Bd. of Educ., Docket No. 35-87-027-3 (June 30, 1987). The level two grievance evaluator apparently recognized the reciprocal element of the 1992 agree ments and ordered back wages beginning October 21, 1993, based on a driving time of one hour and forty-five minutes. In that Grievant was not notified at any time during the 1993-94 school year of a proposed or actual alteration of the stipend he earned for driving his supplemental run, he is entitled to relief.

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

appropriate.

Findings of Fact

1. Grievant, a bus operator, has held a midday supplemen tal run for five years.

2. MCBE does not incorporate wages for supplemental runs in a bus operator's salary; rather, a computation is made for each day the operator actually completes the run and any wages due are added to the salary each pay period. Time is allowed for bus preparation, but no time is allowed for post-driving clean up.

3. Up to and including the 1992-93 school year, Grievant was paid for two hours' work each day he drove his supplemental run.

4. At some time prior to the beginning of the 1992-93 school year, bus operators agreed to route and stipend adjustments after the school year began. Apparently in conjunc tion with that agreement, operators were required to verify the time required to complete the supplemental run after the school year began, among other things.

5. Shortly after the beginning of the 1993-94 school year, Grievant submitted data generally indicating that he needed two hours to complete his midday run.

6. In October 1993, transportation department officials discovered that another driver who traveled the same route as Grievant completed the chore in one and one-half hours. The evidence establishes that the time variance occurred because, among other things, Grievant left the bus garage for the first school about fifteen minutes earlier than the other driver and also added ten minutes clean up time after he completed the run and arrived back at the bus garage.

7. Subsequent to forming the belief that Grievant's midday run could be completed in one and one-half hours, MCBE began paying Grievant for only one and one-half hours each day he drove the run, effective October 21, 1993. Grievant was never informed of this adjustment to his supplementary wages.

8. Had Grievant eliminated ten unnecessary minutes from his departure time from the bus garage and ten disallowed minutes for cleaning his bus upon his return to the garage, his supplemental run during the 1993-94 school year could have been completed in slightly less than one hour and forty-five minutes.

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Given the facts of this case, the contract termination provisions of W.Va. Code 18A-2-6, the transfer requirements of Code 18A-2-7, as well as the relegation clause contained in 18A-4-8, are not applicable.

3. Grievant failed to prove he was entitled to two hours' wages for each day he performed his supplemental run during the 1993-94 school year.

4. Grievant has demonstrated that he is entitled to some relief in this action, based upon MCBE's policy to pay for the actual time needed to drive a supplemental run within fifteen minute increments.

5. Inasmuch as Grievant's supplementary run during the 1993-94 school year took more than one and one-half hours and

less than one hour and forty-five minutes to complete, he is entitled to back wages, as set forth in the September 27, 1994, level two decision.

Accordingly, the grievance is GRANTED to the extent that MCBE must pay Grievant "for fifteen minutes back pay for each day that he drove his noon run last year . . . offset by any required deductions," effective October 21, 1993 (for the 1993-94 school year), in accordance with the level two decision. All other relief is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: April 19, 1995