JAYELL FROATS

v. Docket Nos. 93-15-251, 257

HANCOCK COUNTY BOARD OF EDUCATION

DECISION

Grievant, Jayell Froats, employed by the Hancock County Board of Education (Board) as a bus operator, advanced the above-styled matters to level four on July 12, 1993. After numerous continuances granted for cause, an evidentiary hearing was conducted to supplement the lower-level records of these and other matters on April 21, 1995. The grievances became mature for decision with the conclusion of post-hearing submissions on or before June 13, 1995.

Because Grievant makes multiple allegations in each grievance the matters shall be addressed individually as filed.

Grievance Docket No. 93-15-251

Grievant alleges that the Board refused to allow her to substitute for another bus operator with a longer contract while said operator was on sick leave, but rather, filled theposition with a younger, male, substitute. (See footnote 1) Grievant further noted that "[a] similar position was posted earlier this year and the supervisor's spouse was allowed to increase hours worked per day." The second allegation involved the "[f]illing of an unposted, instructors['] position by a less qualified-less senior male." As relief, Grievant seeks lost wages and "an end of reprisal toward me through acts of sex and age discrimination, favoritism and neopitism [sic]."

Issue 1: Substitution for another employee

The facts relating to the first issue are not in dispute. William Parsons, a bus operator with an eight hour contract, began using accrued sick leave on April 12, 1993. Grievant, who has a five and three-quarter hour contract, advised Transportation Director Charles Pugh by letter dated May 4, 1993, that she wished to immediately assume Mr. Parson's assignment, pursuant to W.Va. Code §18A-4-15. Grievant's request was denied based on the Board's practice of placing regular

substitutes in positions held by employees utilizing their accrued sick leave, and posting positions only after the sick leave benefits have expired or a leave of absence requested. The Board denies any violation of Code §18A-4-15 and argues that the grievance was not timely filed.

W.Va. Code §18A-4-15, addressing the employment of service personnel substitutes, provides in pertinent part

[t]hat if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

The Grievance Board has previously ruled that due to the nature of their duties, bus operators do not share a common work site as contemplated by W.Va. Code §18A-4-15. Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (March 6, 1992). Second, Grievant's reference to the spouse of the Transportation Director receiving such an assignment was rebutted by the Board when it explained that the position assigned to Mrs. Pugh was available because the regular employee had exhausted his sick leave and was on an unpaid medical leave of absence. Thus, Mrs. Pugh's assignment was consistent with Board practice and not indicative of nepotism.

The grievance was not timely filed under the provisions of W.Va. Code §18-29-4 which requires within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or withinfifteen days of the most recent occurrence of a continuing practice giving rise to the grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Grievant's testimony at level two indicates that she was aware of Mr. Parson's absence shortly after the fact. She makes no assertion that the information was unknown to her for any period of time. On the contrary, when asked by her representative why she delayed filing a grievance for five weeks, Grievant's response was "Sometimes I want to wait and just see what they are going to do." Grievant has exercised her rights under the grievance procedures many times over the years and is

well aware of the rules which must be followed. Clearly, a grievance filed on May 11, 1993, as the result of an event which occurred on April 12, was untimely filed.

Issue 2: CPR assignment

The record establishes that Board employees are required to maintain current certification in CPR. In Spring 1993, a bus operator, identified as Mr. Doughty, was paid to provide this instruction. The classes were conducted between bus runs, two or three days a week in late April and/or early May. Grievant argues that this was an extra duty assignment and should have been assigned accordingly (T p. 14), and/or that it was an extracurricular assignment which should have been posted and filled with the most qualified applicant (T p. 15). The Board denies that a position of CPR instructorexists. It asserts that it provided the training as a courtesy and that to the administrators' knowledge, Mr. Doughty was the only Board employee licensed by the Red Cross as a CPR instructor. He had voluntarily assisted with the program in 1991-92. In 1992-93 he was compensated at an unspecified rate, although Mr. Pugh speculated it was the same as a bus operator.

The alleged position at issue was not an extracurricular assignment as defined by W.Va. Code §18A-4-16, which defines such duties as those "which occur on a regularly scheduled basis." Clearly, the CPR classes were offered only for a brief period of time at the end of the year, on no regular schedule. Neither does the instruction clearly fall within the parameters of an extra-duty assignment. Certainly, the assignment did not entail the transportation of children, the duty for which bus operators are employed. Further, CPR instruction requires specific licensure not required of bus operators in the course of their employment.

Furthermore, it is not clear from the record whether the CPR instructor was classified as a service or professional position. ABE instructors may or may not be required to hold licensure from the State Department of Education. Clearly, individuals teaching academic subjects would necessarily be licensed. Instructors for positions such as First Aid may require some type of certification other than that issued to professional educators. Conversely, because the First Aidposition involves instruction, it does not meet the definition of service personnel set forth in W.Va. Code §18-1-1 (h). In any event, the Board had created a paid position in 1993, and consistent with requirements for both service and professional personnel, the vacancy should have been posted in 1993.

Notwithstanding this holding, the record indicates that both Grievant and Mr. Doughty held the

required Red Cross certification. The record does not establish that Grievant had greater seniority than Mr. Doughty, or which individual was more qualified. Although Grievant asserts that she is more qualified, this is based only upon knowledge of her own background. Finally, the Board notes that Grievant had been unable to complete her duties as a bus operator since October 1993, and had not been certified for even light duty work by her physician.

Grievant asserts that while disabled from operating a bus, she is capable of teaching. This claim is clouded, however, by an apparently contradictory comment that she was not physically capable of performing duties of an aide. In summary, it cannot be concluded that Grievant proved by a preponderance of the evidence that she would have been entitled to the position, had it been posted.

Grievance Docket No. 93-15-257

Grievant sets forth three issues in this grievance. First, she complains that a "new pay scale" was implemented"which greatly increased the wages of certain younger and/or male employees of the Transportation Department." Grievant asserts that she had previously requested the same adjustment but that it had been denied. She characterized the salary adjustments as favoritism, sex and age discrimination, and retaliation for filing other grievances. As relief, Grievant "seeks the opportunity to use the seniority rights guaranteed by the State of West Virginia and all lost wages."

Grievant's second complaint is that she is employed under a five and three-quarter hour contract but that her duties consume up to eight and one-quarter hours. Grievant requests that she be reimbursed for "lost wages for all hours worked in the preformance [sic] of Bus C duties." The third issue involves a procedure used by the Board regarding emergency extra-duty assignments.

Issue 1: Pay Scale

This matter was vaguely defined by Grievant; however, it appears that the Board had previously applied a salary scale to bus operators which offered a lower hourly wage for advanced hour contracts. In other words, employees with five and three-quarter hour contracts were paid a higher hourly rate than employees with seven or eight hour contracts. Apparently, the inequity was corrected in September 1992, as a result of a prior grievance.

Grievant argues that the salary and some duty adjustments constitute a major change in the assignments requiring thatthe seven and eight hour positions be posted and filled. It appears that Grievant requested this very adjustment in 1976, and when the Board declined to change the pay

scale, she transferred to a five and three-quarter hour position. Seemingly, she now wants to bid back into one of the extended day contracts and may be requesting backpay. Again, she alleges that the changes benefitted younger and male employees resulting in sex and age discrimination. Reprisal is also stated as part of the complaint.

The Board asserts that the change in pay scale was completed on September 14, 1992; therefore, the grievance was untimely filed in April 1993. Grievant claims that she had not confirmed the revision until she received a letter from Superintendent Daniel Curry on April 8, 1993.

Grievant cannot prevail in this matter. The correction of salaries does not alter a position requiring that it be reposted. Any changes in duties were not identified by Grievant. Although Grievant is frustrated that her request for the same salary enhancement was denied nearly two decades ago, and is presently unhappy that her decision at that time to accept a contract with fewer hours now results in her earning less, she has not proven that the extended day contracts need be posted and refilled, or otherwise established any entitlement to an extended day contract.

Issue 2: Grievant's work schedule

In the statement of the grievance, Grievant claims thather duties consume up to eight and one-quarter hours per day. At the level two hearing Grievant stated her actual working time to be seven hours and fifty minutes. Both times exceed the five and three-quarter hour contract for which she is compensated. Grievant submitted a letter dated October 23, 1992, to Assistant Superintendent Ronald Daugherty (G.E. 1) in which she stated her daily schedule requires:

Actual driving time 365 minutes

Board time allotment for administrative

and maintenance work 35 minutes

Duty free lunch 30 minutes

State and Federal mandated pre- and

post trip inspections 40 minutes

for a total of 470 minutes or seven hours and fifty minutes.

Transportation Director Charles Pugh testified that he has ridden with Grievant during her morning and mid-day runs and has no reason to question the time for her afternoon run. He found that Grievant's duties consume five hours and forty minutes per day, four days of the week. The fifth day Grievant has no mid-day run and her work time is lessened by approximately two hours. In the

level one response, Mr. Pugh stated that Grievant is not entitled to a duty free lunch and questions Grievant's allocation of time for reports and cleaning.

It may be accepted that Grievant did work the extended hours which she documented in G.E. 4. However, the fact that she worked of her own volition does not entitle her to additional compensation or an extended contract. It is undisputed that a substantial portion of Grievant's day isconsumed with actual driving time. She is required to complete reports, clean the bus, and conduct pre- and post-trip inspections. For all these duties, Grievant is entitled to compensation.

A review of the schedule submitted by Grievant for 1992-93 establishes that on Monday, Tuesday, Thursday, and Friday, four hours and fifteen minutes were required for actual driving time and intermediate pre- and post-trip inspections. The Hancock County School Service Personnel Handbook provides that bus operators be allowed ten minutes prior to the first morning run for preparation of the bus. Twenty-five additional minutes are calculated into the schedule for washing the bus, completing reports, cleaning the bus, etc. These calculations indicate Grievant could complete her duties in approximately four hours and fifty minutes those four days of the week. A mid-day run on Wednesdays increased Grievant's work time by two hours, to approximately six hours and fifty minutes. Because Grievant's actual work time exceeded her contract time, she is entitled to compensation for sixty-five minutes for every Wednesday she completed a mid-day run, beginning with the 1992-93 school year.

Issue 3: Emergency Extra-Duty Assignments

Grievant alleges that extra-duty assignments were made contrary to that which the employees voted to use. She further complains that the procedure was being manipulated under the guise of being an emergency, causing her to lose atleast two assignments.

In the level one decision Mr. Pugh addressed the two incidents referred to by Grievant, explaining that one involved unusual circumstances and that the other had been deemed an emergency. At level two, Superintendent Curry held that the procedure used was proper.

A review of the level two transcript establishes that this issue was not developed at hearing. Further, no evidence was offered regarding this matter at level four. Under such circumstances it must be concluded that Grievant has failed to prove the claim.

Reprisal

One issue raised throughout these complaints is that the Board acted in reprisal for Grievant's

previous grievance activity. Reprisal is defined in W.Va. Code §18-29-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." The purpose of this and similar statutes prohibiting acts of reprisal is to make it unlawful for an employer to take any action designed to punish an employee for engaging in a protected activity, such as filing a grievance and pursuing it vigorously, and/or to deter an employee from exercising such rights. Connor v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). A grievant who alleges reprisal must establish a prima facie case by showing that she engaged in aprotected activity; that the employer was aware of the protected activity; that the employer subsequently took an adverse action against the employee; and retaliatory motivation or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred. An employer may rebut a prima facie case of reprisal by presenting evidence of a legitimate, non-retaliatory reason for the adverse action. Upon such showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for the actual retaliatory motive.

As noted in Connor, a prima facie case is extremely easy to establish where the alleged act of reprisal occurs within a short period of time after the protected activity. Because Ms. Froats is a prolific grievant, a prima facie case is almost always a matter of fact. However, as previously discussed, the Board has provided legitimate, non-retaliatory reasons for the actions subject to these grievances and Grievant has failed to prove that those reasons were pretextual. Therefore, it cannot be concluded that the Board has engaged in reprisal.

In addition to the foregoing narration it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. Because bus operators do not share a common work site as contemplated by W.Va. Code §18A-4-15, Grievant was not entitled to assume the run of another bus operator who was on sick leave. Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992).

2. A different factual situation which led to the spouse of the Transportation Director assuming the run of a bus operator who was absent on medical leave, was in compliance with Board practice and

does not constitute nepotism.

3. Grievant's complaint regarding the assumption of another bus operator's run commencing on April 12, 1993, was untimely filed on May 11, 1993. W.Va. Code §18-29-4.

4. Grievant has failed to prove by a preponderance of the evidence that she was entitled to a position teaching an Adult Basic Education Class in CPR.

5. Grievant has failed to prove that extended day runs must be reposted and refilled following a realignment of salaries as the result of a prior grievance.

6. Grievant has failed to prove that the duties necessary to her position exceed the five and three-quarter hour contract which she was assigned during the 1992-93 school year, with the exception of Wednesdays when a mid-day run extended her work day to six hours and fifty minutes.

7. Grievant is entitled to compensation for the additional time she worked per week beyond her contract, beginning with the 1992-93 school year.

8. Grievant failed to prove the claims relating to two extra-duty assignments which she alleged had been improperly assigned to another employee.

9. Grievant has failed to prove that she was the victim of reprisal as that term is defined in W.Va. Code §18-29-2(p).

Accordingly, the grievance regarding Grievant's extended work schedule is **GRANTED** to the extent discussed herein; all other matters are **DENIED.**

DATED SEPTEMBER 28, 1995 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1At the level four hearing the Board asserted that Grievant had filed similar or identical complaints to the Human Rights Commission. Grievant then advised that she would seek relief for the claims of sex and age discrimination outside the grievance procedure. Accordingly, these issues will not be addressed herein.