PATRICIA PUGH

v. Docket No. 94-15-336

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, a bus operator for Respondent Hancock County Board of Education (HCBE), alleges violations of W.Va. Code 18A-4-8b and 18A-4-16(4) relative to her seven-hour driving contract. Grievant feels her "seniority rights" have been compromised and that part of her driving route is an extracur ricular assignment for which she should be separately contract ed. HCBE denies wrongdoing, alleges untimeliness and claims res judicata should apply because the issue raised by Grievant was previously litigated in Pugh, et al., v. Hancock County Bd. of Educ., Docket No. 92-15-400 (Feb. 23, 1993) (hereinafter Pugh I, a case denied and never appealed). This case became mature for judgment on February 16, 1995, upon receipt of Grievant's fact/law proposals.1

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1The parties agreed that a decision could be rendered based upon the record developed at the lower grievance levels. In addition to Grievant's brief, the record contains HCBE's letter brief, received February 8, 1995.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.2

Findings of Fact

1. HCBE contracts its bus operators for either five and three-quarter hours or seven hours, depending on need.

2. Prior to 1992, HCBE posted some midday and after-school driving assignments as supplemental or "auxiliary" runs

and awarded them to the most senior bidder holding a five and three-quarter hour contract.

3. Sometime in 1992, HCBE reorganized its Transportation Department due to the establishment of full-day kindergarten classes (and elimination of half-day kindergarten) and a drastic reconfiguration of the grade levels in some of its schools, events which affected bus driving needs.

4. As part of the Transportation Department's reorganiza tion, beginning the 1992-93 school year, HCBE incorporated all supplemental driving assignments, whether midday or late after noon driving, into comprehensive seven-hour contracts along with the "regular" morning and afternoon driving assignments (some times referred to as a.m. and p.m. runs).

5. Grievant has been employed by HCBE as a bus operator for approximately twenty-five years. Due to her seniority, she could probably outbid most other bus operators for vacancies.

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2The record contains the lower-level adverse decisions and the transcript of the July 6, 1994 level two hearing. The sole hearing exhibit is HCBE's Ex. 1, a copy of Pugh I.

6. In Pugh I, Grievant and three other bus operators who held five and three-quarter hour contracts grieved because their separately-contracted midday driving runs were terminated for the 1992-93 school year and eventually reassigned to other drivers whose driving time fell short of their contracted time due to the reconfiguration of schools and other factors. The grievants insisted that their former midday supplemental runs were vacant "positions" and sought to have those assignments posted and filled according to seniority.

7. In Spring 1994, Grievant bid upon a posted vacancy for route No. 24. Since at least the time of the Transportation Department's reorganization in 1992, and perhaps for some time before, the route No. 24 assignment consisted of a unified seven-hour contract with daily a.m. and p.m. runs and a late afternoon, after-school supplemental run taking students home from Oak Glen High School at approximately 5:00 p.m.3

8. After Grievant won the bid for route No. 24, she filed a grievance and sought to have the route's late-afternoon driving assignment contracted separately from the a.m. and p.m. runs so that she could keep the late-afternoon driving

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3HCBE actually identifies a bus driving route according to the bus's number. In this case, Grievant was unable to drive bus No. 24 and had to drive route No. 24 in bus No. 36, a bus she had formerly driven. See T.44-45.

assignment in the event that a more attractive five and three-quarter hour vacancy became available for her to bid upon.4

Discussion

Grievant essentially claims the late-afternoon driving assignment is an extracurricular assignment pursuant to W.Va. Code 18A-5-16. She opines that she obtained the late-afternoon assignment via a seniority-based bidding process and is entitled to keep it even if she bids on another posted (a.m. and p.m.) vacancy. Pertinent provisions of W.Va. Code 18A-5-16 are as follows:

(1) The assignment of . . . service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superinten

dent . . . subject to board approval. Extracurricular duties shall mean, but not be limited to, any activi ties that occur at times other than regularly sched uled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

(2) The employee and the superintendent . . . subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assign ment in each school year for each extracurricular assignment.

(3) The terms and conditions of the agreement between the employee and the board. . .shall be in writing and signed by both parties.

(4) An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment . . . .

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4In the pleadings submitted by Grievant at level four, she cites "discrimination" as part of the "grievable event." However, the issue was not raised at the level two hearing or in her level four fact/law proposals and is, therefore, considered abandoned.

According to Grievant, the driving assignment in this case involves after-school driving, "beyond the regular school day." Since the driving occurs after the work day, she argues, it

qualifies as an extracurricular assignment. As additional support of her position herein, Grievant cites a holding in Billick v. Ohio County Bd. of Educ. Docket No. 35-86-370-3 (June 30, 1987), specifically, "School law permits that a service employee may negotiate terms and conditions as well as agree upon procedures for dispensation of extra employment for duties and assignments in addition to their regularly contracted assignment. W.Va. Code []18A-4-8b(b) [and] 18A-4-16."

HCBE contends that Grievant knew since the 1992 reorganiza tion of the Transportation Department that all driving contracts became unified, and she failed to file a grievance over the issue at that time. It also claims res judicata should apply because the same issue was raised and decided in Pugh I. Finally, HCBE argues that Grievant has simply failed to justify, either factually or legally, that HCBE must "undo the realign ment of transportation contracts," which Grievant essentially seeks in this action.

Grievant counters that the violation concerning route No. 24's unified seven-hour contract is a "continuing" violation, and that she may properly raise the issue now. Grievant also insists that the issue in Pugh I is different than the issue raised in this case because the bus runs in question in Pugh I involved midday driving assignments which occurred during the curricular day and not after-school, late-afternoon driving assignments which occur after the Transportation Department's office and bus terminals close and the bus operators' work day ends.

This grievance cannot be dismissed or denied on the basis of untimeliness. HCBE's essential claim that the reorganization of the Transportation Department and creation of unified bus

driving contracts in 1992 must be regarded as the grievable event in this case cannot be sustained. Neither do the facts in this case support a finding that a "continuing" violation has occurred, as Grievant claims. Grievant apparently held a five and three-quarter hour contract in 1992 and was not involved in any way with route No. 24. Had Grievant filed a grievance in 1992 with regard to route No. 24, she would have had no standing because a now-retired bus operator held the route at the time. See Lyons v. Wood County Bd. of Educ., Docket No. Docket No. 89-54-601 (Feb. 28, 1990). In fact, Grievant brought this action in 1994 shortly after she won the bid for route No. 24's seven-hour contract. HCBE does not allege that Grievant failed to timely file a grievance after she won the bid for route No. 24 in 1994. Accordingly, the grievance is timely filed.

The question of whether res judicata should be applied is somewhat closer. HCBE argues that res judicata should apply in this case because the issue of whether HCBE's midday "supplemen tal" runs were vacancies which had to be posted and filled according to seniority was decided in Pugh I. However, the bottom line is that the precise issue of whether HCBE's late-af ternoon supplemental runs were extracurricular runs pursuant to Code 18A-4-16 has never been addressed at level four. There fore, it is determined that res judicata should not apply in this case. See Farley/Stover v. Mason County Bd. of Educ., Docket No. 94-26-639 (Feb. 28, 1995); Fuchs v. Brooke County Bd. of Educ., Docket No. 94-05-010 (Apr. 29, 1994); Woodall v. W.Va. Dept. of Trans., Docket No. 93 DOH-393 (Feb. 2, 1994).

Unfortunately for Grievant, she has failed to provide any basis for the relief she requested. A county board of education in West Virginia has substantial discretion in matters relating

to the assignment of school personnel. This discretion must be exercised reasonably, in the best interests of the schools and in a manner neither arbitrary nor capricious. Dillon v. Board of Educ. of the County of Wyoming, 351 S.E.2d 58, 64-65 (W.Va. 1986). The record in this case does not support a determination that HCBE violated Code 18A-4-16, acted contrary to any other law or regulation, or otherwise abused its discretion in this matter.

First, Grievant's reliance on Billick v. Ohio County Bd. of Educ., Docket No. 35-86-370-3 (June 30, 1987), is misplaced. The issue raised in Billick was whether seniority should prevail in the awarding of supplemental runs. Critical to that issue was the fact that the board of education in Billick permitted its bus operators to vie for available supplemental runs and treated those jobs separately from the bus operators' regularly contracted a.m. and p.m. assignments. Given that specific factual situation, the holding in Billick which stated that "a service employee may negotiate [the] terms and conditions as well as agree upon procedures for [the] dispensation of extra employment" pursuant to W.Va. Code 18A-4-8b(b) and 18A-4-16, was appropriate and correct.

However, not all county boards of education handle ongoing supplemental runs (year long runs which occur at times other than the "regular" a.m. and p.m. runs) as separately contracted jobs. See, e.g., Stern/Blackburn v. Brooke County Bd. of Educ., Docket No. 93-05-093 (Aug. 16, 1993); Dennison v. Braxton County Bd. of Educ., Docket No. 04-88-251 (Mar. 17, 1989). In fact, due to changing needs in 1992, HCBE realigned and unified its bus operators' contracts so as to cover all driving needs within the work day. Notably, the Grievance Board determined in Pugh I

that HCBE's reallocation of midday driving runs, combining such assignments with a.m. and p.m. runs, was permissible. However, in this action, Grievant challenges her present late afternoon driving assignment.

Grievant's contention that the driving assignment in this case is an extracurricular assignment, as contemplated by Code 18A-5-16, because it occurs "beyond the regular school day" is not persuasive. According to 18A-4-16, extracurricular duties involve work which occurs "at times other than regularly sched uled working hours." The hours of the "regular school day" do not necessarily define an employee's "regularly scheduled working hours." A custodian who works a night shift performing custodial duties is not engaging in extracurricular work simply because the work occurs "beyond the regular school day." Likewise, a bus operator who is scheduled to perform driving duties on a daily basis after the end of the school day, but within his or her contracted working hours, is not engaged in the performance of extracurricular duties. See Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (Aug. 16, 1993).5

In addition to the foregoing, the following formal conclu sions of law are appropriate.

Conclusions of Law

1. The event upon which this grievance is based is Grievant's receipt of a unified seven-hour contract for bus route No. 24 in 1994. Since there has been no claim or showing by HCBE that Grievant did not timely file this grievance in 1994 after she won the bid, HCBE has failed to support its allegation that the grievance was untimely filed.

2. "This grievance raises a new issue not raised or addressed in previous cases; therefore, the doctrine of res

judicata does not apply. See Woodall v. W.Va. Dept. of Trans., Docket No. 93-DOH-393 (Feb. 2, 1994), and cases cited therein." Fuchs v. Brooke County Bd. of Educ., Docket No. 94-05-010 (Apr. 29, 1994).

3. A county board of education in West Virginia has substantial discretion in matters relating to the assignment of

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5The issue of late afternoon driving assignments, so-called after-school "activity" runs, was addressed in Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (Aug. 16, 1993). It was noted in that case, see, n.2, that "students who use the late afternoon activity buses have not been transported home prior to their various practice sessions; therefore, the activity runs could be considered 'curricular' runs."

school personnel. This discretion must be exercised reasonably, in the best interests of the schools and in a manner neither arbitrary nor capricious. Dillon v. Board of Educ. of the County of Wyoming, 351 S.E.2d 58, 64-65 (W.Va. 1986).

4. "Year-long, ongoing, curricular busing assignments which occur at times other than the conventional AM/PM slots constitute driving responsibilities which fall within the scope of bus operators' duties and are not per se separate 'posi tions'." Pugh, et al., v. Hancock County Bd. of Educ., Docket No. 92-15-400 (Feb. 23, 1993).

5. Grievant failed to prove that HCBE violated W.Va. Code 18A-4-16, or otherwise abused its discretion when it posted and filled bus route No. 24 so as to include late afternoon driving along with a.m. and p.m. driving in one unified seven-hour contract.

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: March 13, 1995