MARY MARGARET THOMASELLI

v. Docket No. 94-15-563

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, employed by Respondent Hancock County Board of Education (HCBE) as a substitute aide, filed a grievance in which she alleged that she was not being properly paid for an assignment as a bus aide/school aide and that she had actually received a reduction in her pay rate from that of a similar job she held earlier in the year. Following adverse decisions at the lower grievance levels, an appeal was advanced to level four in September 1994. Although a hearing was initially requested, the parties eventually agreed that a decision could be based on the existing record supplemented by written argument. The case became mature for decision on April 14, 1995, upon receipt of the parties' final submission.1

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1The record includes a copy of the transcript of the July 11, 1994 level two hearing.

Based on all matters of record, the following findings of fact are properly made.

Findings of Fact

1. Grievant was initially employed as a county-wide substitute aide/cook in August 1992. She apparently worked enough days during the 1992-93 school year to receive a year's service credit for pay purposes.

2. HCBE's aides work a seven-hour day (including a lunch break) for which they receive "full-time" wages while most other

service personnel (excluding bus operators) work an eight-hour day.

3. After the beginning of the 1993-94 school year, in early November 1993, Grievant was called out to work as a school aide in an elementary school, a short-term, seven-hour substi tute position which she held for several days.

4. Grievant's daily rate as a seven-hour school aide at the elementary school was $59.57, and she does not assert that the salary she received for that job was incorrect.

5. Prior to the 1993-94 school year, HCBE reorganized its transportation department for more efficient operations. One of its actions was to place full-time bus aides on transfer so as to assign them additional duties as classroom/school aides for a few hours after their morning bus run in order to fill out their work schedule. Because the aides were then required to return to work on the buses in the afternoon after a "down" time, HCBE also determined that it must pay these workers additional money for "split-shift" or interrupted service, pursuant to W.Va. Code 18A-4-8.2

6. On November 9, 1993, HCBE offered Grievant, as the most senior substitute at the time, a long-term substitute bus aide/school aide position. Grievant accepted the job and kept the temporary assignment throughout the rest of the the 1993-94 school year.

7. The temporary job which Grievant accepted was being indefinitely retained by HCBE for a bus aide who held a seven and one-half hour contract and who had been absent for an extended period due to a work-related injury.3

8. Grievant testified that she worked as a bus aide for approximately four and a half hours to five hours per day and

that she worked as a school aide for two hours per day. She explained that she worked on the bus from 7:00 until 9:30 a.m., then reported to the middle school for duties from 9:45 until 11:45 a.m. Later in the afternoon she reported to the bus garage for a 1:40 p.m. departure and returned at 4:00 p.m., with an occasional "long day" if the bus did not return until 4:30

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2Code 18A-4-8 states in pertinent part:
Custodians, aides, . . . and school lunch employees required to work a daily schedule that is interrupted, . . . shall be paid additional compensation which shall be equal to at least one eighth of their total salary . . . . Provided, That when engaged in duties of transporting students exclusively, aides shall not be regarded as working an interrupted schedule.

3After Grievant held the position for thirty days, HCBE granted her paid vacation days, accumulated sick leave and all of the other benefits it extended to regular, full-time employees.

p.m. T.19, 46. The record is silent as to whether Grievant had a lunch break built into her schedule, although it does not seem likely, based upon Grievant's testimony about her work schedule.

9. Other substitutes who had been placed in the seven and one-half hour bus/school aide job prior to Grievant's placement were required to serve as bus aides and school aides for seven and one-half hours under the split-shift work schedule.4 The record is silent as to how those workers were paid.

10. Grievant, whose overall monthly salary purportedly is based on "full-time" employment, discovered sometime in early

1994 that she earned more money per hour and per day as a seven-hour school aide in the elementary school in early November 1993 than she earned as a seven and one-half hour bus aide/school aide from November 8, 1993, onward. Grievant's daily rate for the bus aide/school aide job was $57.65.

11. When Grievant noticed the discrepancy in her paycheck, she believed it was a payroll error, so she placed a call to HCBE Assistant Superintendent Ronald Daugherty. She said that Mr. Daugherty told her she was earning full-time wages for full-time work but that he would "check into it." T.13. When Grievant heard no more from Mr. Daugherty, she called his office on numerous occasions, but to no avail.

4The worker who was on extended sick leave had never worked as a school aide. This is because the reorganization of the transportation department occurred after she went on leave. However, HCBE's officials claim the worker's duties were modified by a transfer action and that she will be required to assume any additional duties as a bus aide/school aide if and when she returns to her job.

12. At some point, Grievant spoke with Mr. Daugherty in person. She claims he told her that she would not only receive an extra half-hour's pay per day, but also a salary adjustment for working a split-shift work schedule.5 Grievant waited two pay periods, but no salary adjustment at all occurred, including the half-hour adjustment for the work required of her over and above that of seven-hour aides.

13. Grievant requested a meeting with Mr. Daugherty on May 31, 1994, to discuss the salary issue. He told her that the

split-shift increment would be paid in a lump sum at the end of the year; however, he refused to adjust her salary on the half-hour issue.6

14. Grievant initiated a grievance on June 8, 1994, within fifteen days of learning from Mr. Daugherty that she would not be getting the salary adjustment she had been led to believe she would receive.

5According to Grievant, the split-schedule matter is not an issue in this grievance. See, T.13 and Grievant's Brief, at 5.

6Findings twelve and thirteen are based upon Grievant's addendum to her level four filing form. While the information Grievant furnished in the addendum is not sworn testimony, HCBE never contradicted any of her written statements, even her claim that, on the day she attempted to file the grievance, Mr. Daugherty had called one of her supervisors, a principal, with the information that the matter would be resolved. According to Grievant, the principal told her she did not have to file the grievance. However, when Grievant called Mr. Daugherty to thank him for the favorable decision, Mr. Daugherty had changed his mind again about the extra pay. Because HCBE did not rebut any of this information or address it in any manner, it is presumed true.

Discussion

Although Grievant hints that she should not have been required to work as a school aide for two hours per day because the absent worker had never performed those duties (see T.10, 17, 25) she does not allege the assignment was improper or ask that she be relieved of those duties. Rather, the focus of

Grievant's claim is the salary she received as a seven and a half hour worker and the relief she specifically requests is a salary adjustment for the extra half hour built into her assign ment, work time which is required of her over and above that of a seven-hour aide who receives full-time wages.7 Grievant argues that there has been a violation of "uniformity of classi fication" and cites as support a portion of W.Va. Code 18A-4-15 pertaining to substitute workers' wages. However, uniformity requirements for service workers' wages would be more properly found in Code 18A-4-5a.

HCBE asserts the grievance was untimely filed since Grievant was assigned the position in question on or about November 9, 1993, and no grievance was filed until the conclu sion of the 1993-94 school term. As for the merits of the case, HCBE denies wrongdoing. HCBE concurs that its service employees may hold seven-hour, seven and one-half hour or eight-hour contracts, but claims that those workers are deemed either "half-time" or "full-time" and paid accordingly. In Grievant's

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7See, Grievant's Brief, at 5: "The discrepancy involving [Grievant's] hourly rate is the only issue disputed in this grievance."

case, HCBE avers, she is classified as a full-time "Supervisory Aide II" with one year of service in accordance with HCBE's pay schedule.8

Based upon the facts and the applicable law in this case, it is determined that Grievant is entitled to relief on her claim for back wages. HCBE's arguments that Grievant has not proven her case or that the grievance should be denied for

timeliness reasons are rejected.

The timeliness issue raised by HCBE, essentially, an affirmative defense which HCBE must substantiate, fails for several reasons. Certainly, the grievable event did not occur when Grievant accepted the job on November 9, 1993, as HCBE seems to suggest. Grievant had no way of knowing when she accepted the job in question that the salary she would earn would be less than that she received for working solely as an aide in a school. Moreover, she could not have known when she received her first paycheck on the new job that anything was

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8It is noted that HCBE declined to file a brief and instead elected to stand on its level two determinations. However, in response to Grievant's level four brief of April 3, 1995, on April 14, 1995, HCBE submitted one last word on this matter. HCBE notes that the

recitation of facts by the Grievant fails to take into consideration that all service personnel were put upon a transfer list at the conclusion of the 1992 school year, and the responsibility of such personnel, including substitute aide, cook and bus aide have been reorganized and her reliance upon past practice is not well placed in these proceedings.

This argument, while perhaps supportive of HCBE's assertion that Grievant was obligated to perform the two-hour school aide duties, a non-issue in this case, simply does not speak to the real issue in this case, the salary Grievant was paid as a seven and one-half hour aide.

amiss. It is utterly impossible to discern from Grievant's pay

stubs just exactly how her salary was calculated. See, Ex. 1. Moreover, HCBE's officials never explained to Grievant how her salary was to be calculated at the time she accepted the bus aide/school aide position or after she began to question why she earned less in the job than she did in the prior job, other than to say she was receiving full-time wages for full-time work. This response simply begs the question because Grievant earned full-time wages for full-time work while on a seven-hour assign ment, but received more money. In fact, HCBE never offered any specifics about the basis of Grievant's wages or any explanation as to why Grievant's salary for a seven and one-half hour assignment was less than her salary for a seven-hour assignment, either during the level two hearing or in the level two deci sion.9

Grievant's argument about the timeliness matter is the most persuasive. She claims her time for filling the grievance

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9Grievant's counsel asked Mr. Daugherty whether Grievant's "rate of pay had been determined by her status, her standing in the school system or based upon the position that she was filling or a combination or both?" Mr. Daugherty's response (T.27-28) was less than enlightening, and not at all specific as to the actual sums Grievant received and why:

She was called to fill the position, but it had been based on what her current substitute status was. If she worked that job for more than 30 days she would be given the normal benefits that come with the position in terms of holiday pay, OE pay, sick leave days of a day and a half per month, and whatever her current

experience status would be on a regular pay scale. If she worked 133 days or more as a substitute she would be entitled to one year's experience from previous substitute time served in the county. That would be basically what her pay is based on.

should begin to toll after HCBE unequivocally refused to adjust her salary, this following months of incomplete and conflicting information about the situation. According to W.Va. Code 18-29-4(a)(1), a grievance must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, the date on which the event became known to the grievant or the most recent occurrence of a continuing practice giving rise to a grievance.

Grievant did not discover the salary discrepancy until early 1994, thus, it is certain that the time for her to invoke the grievance was not November 1993, the time she accepted the job in question. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990). However, even after her discovery of what might have been a mere payroll error, Grievant inquired but never received a satisfactory explantion about why she made less money as a seven and one-half hour worker than as a seven-hour worker. When Grievant inquired, she was given incomplete reasons and conflicting information as to salary adjustments. Grievant made a diligent, good faith effort over the months in early 1994 to resolve the salary matter, in part based upon representations that the problem would be rectified. This is more justification for Grievant's delay in formally filing a claim. See Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991). In short, because Grievant never received a definite response to her salary inquiries until Mr.

Daugherty finally and unequivocally refused to adjust her salary on May 31, 1994, her filing time began to run on that date. Grievant filed a grievance within fifteen days, on June 8, 1994; therefore, the grievance is timely. See Spahr, supra; Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994).

The merits of the case can now be addressed. As Grievant correctly points out, Code 18A-4-15 requires that a substi tute's wages be based upon the substitute's years of employment, the state's pay scale and "in accordance with the salary sched ule of persons regularly employed in the same position in the county in which [the substitute] is employed." HCBE officials agree that Grievant filled the position of a seven and one-half hour worker. Additionally, HCBE's Assistant Superintendent testified that after Grievant was on the job for thirty days, she was treated like a regular employee and "given the normal benefits that come with the position in terms of holiday pay, OE pay, sick leave days . . . and whatever her current experience status would be on a regular pay scale." T.27-28.

While HCBE does not pay service employees based upon an hourly rate, see T.29, given the circumstances of Grievant's seven and one-half hour assignment, she was due a one-half hour daily salary supplement based upon her regular daily rate of pay. W.Va. Code 18A-4-5b mandates that "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensa tion for all persons regularly employed and performing like assignments and duties within the county[.]"

HCBE's aides receive full-time wages based upon a seven hour workday. Grievant's workday as an aide involved a seven and one-half hour assignment. Therefore, seven-hour aide

workers and seven and one-half hour aide workers are not simi larly situated. Accordingly, for HCBE to pay Grievant the same amount which is paid to seven-hour full-time workers is inequi table and violative of the uniformity statute. See McCarty v. Pocahontas County Bd. of Educ., Docket No. 92-38-425 (Dec. 31, 1992); Curry v. Logan County Bd. of Educ., Docket No. 23-87-218 (Oct. 5, 1988).

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

Conclusions of Law

1. A board of education employee must initiate a griev ance within fifteen days following the occurrence of the event upon which the grievance is based, the date on which the event became known to the grievant or the most recent occurrence of a continuing practice giving rise to a grievance. W.Va. Code 18-29-4(a)(1).

2. Given the circumstances in this case, Grievant timely filed a grievance within fifteen days after HCBE finally and unequivocally refused to adjust her salary. See Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991).

3. 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).

4. A substitute service worker's wages must be based upon the substitute's years of employment, the state pay scale and "in accordance with the salary schedule of persons regularly

employed in the same position in the county in which [the substitute] is employed." Code 18A-4-15.

5. Uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county. W.Va. Code 18A-4-5b.

6. Grievant has established a violation of the "uniformi ty statute" for service workers, W.Va. Code 18A-4-5b. See McCarty v. Pocahontas County Bd. of Educ., Docket No. 92-38-425 (Dec. 31, 1992); Curry v. Logan County Bd. of Educ., Docket No. 23-87-218 (Oct. 5, 1988).

7. Grievant has proven that she is entitled to back wages in the amount of one-half hour per day, based on her proper daily rate for a seven-hour workday for aides, for the daily work she performed from November 9, 1993, through the end of the 1993-94 school year.

Accordingly, the grievance is GRANTED, and HCBE is Ordered to pay Grievant back wages consistent with the findings and holdings in this decision.

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.

NEDRA KOVAL

Administrative Law Judge

Date: April 28, 1995