JOHNNY SARGENT, ET AL.,

Grievants,

v. **Docket No. 06-40-426**

Sue Keller

Senior Administrative Law Judge

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, seventeen bus operators employed by the Putnam County Board of Education ("PCBE"), filed a level one grievance on August 17, 2006, in which they alleged violations of *W. Va. Code* §§18A-2-5; 18A-2-6a; 18A-2-8; 18A-4-16(3)(6); and 18A-4-8(m), when changes were made to extracurricular compensation. (See footnote 1) For relief, Grievants request reinstatement of the 2005-2006 pay plan for extracurricular assignments, which included payment for "wait time." Consideration of the grievance was waived at level one. The grievance was denied at level two, and Grievants elected to bypass consideration at level three, as is permitted by *W. Va. Code* §18-29-4(c). A level four appeal was filed on November 14, 2006. Susan Hubbard, Grievants' West Virginia Education Association representative, and PCBE counsel Gregory W. Bailey, of Bowles, Rice, McDavid, Graff & Love, agreed to submit the grievance for decision based on the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by PCBE on December 18, 2006. Grievants elected not to file proposals at level four.

Issues and Arguments

Grievants argue that the change in compensation is in violation of the non-relegation clause set forth in *W. Va. Code* § 18A-4-8(m), and § 18A-4-16, which addresses extracurricular assignments. PCBE argues that compensation for "wait time" had never been approved by the board, or identified as a term of an extracurricular contract, and payment for this time is now contrary to the terms of the Fair Labor Standards Act since Grievants are no longer required to wait at a designated location. (See footnote 2)

The following facts have been derived from a preponderance of the credible evidence made part

of the level two record.

Findings of Fact

1. Grievants have been employed by PCBE as bus operators at all times pertinent to this grievance.

2. In addition to their regular assignments, Grievants complete mid-day runs, such as vocational runs, for which they earn additional compensation.

3. By memorandum dated November 3, 2005, PCBE Superintendent Harold Hatfield notified all bus operators that a number of changes had been made to the Overtime Regulations and Procedures, including:

Wait time during supplemental runs will be counted as time worked and will be paid for accordingly. However, you must park your bus at the nearest bus lounge and wait there until the return trip begins.

This change had not been approved by PCBE, but was made by Superintendent Hatfield so that the bus operators would be available if needed for an emergency situation.

4. On June 7, 2006, Superintendent Hatfield issued Grievants a letter stating in pertinent part:

This letter is in regard to your extracurricular (supplemental) bus assignment(s). As you are probably aware from previous discussions, the Fair Labor Standards Act (FLSA) makes a distinction between 'on duty' and 'off duty' for purposes of time worked. Accordingly to the FLSA, periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own purposes are not hours worked, even if the employee is away from his or her normal work location overnight. . . . For enforcement purposes, the Department of Labor uses a minimum of 30 minutes. In situations where these requirements are met, the employee is considered to be 'waiting to be engaged' and the time does not need to be considered work time.'

To ensure consistency with the FLSA regulations, I am clarifying our overtime regulations and procedures with regard to this issue. The regulations now state that only driving time will be counted as time worked. Wait time for extracurricular assignments shall not be included in the time worked unless the wait time is less than thirty (30) minutes in duration. Please be advised that you are not required to be 'on duty' from the time you deliver your students until the time that you pick them up. Consequently, you will be paid only for your actual drive time at an hourly rate of $10.00, with a

$10.00 minimum for any run that is less than one hour in duration, as established by the Board. This clarification will be effective beginning with the 2006-07 school year. Your actual work time must be reflected accurately on both your weekly time sheet and your supplemental bus pay request. If you wish to return to your bus lounge so that you have access to your personal vehicle during your wait time, please notify Mr. Johnson so that he can determine the system that will be used to accommodate you.

5. As a result of the revision, Grievant Sergent is compensated for thirty minutes required to transport students to the vocational center. He is not on duty, and is not paid, for the two and one-half hours until the return trip.

6. Grievants are no longer required to remain in a designated area, and are no longer "on-call." Effective the 2006-2007 school year, they are not prohibited from using the time between the runs effectively for their own purposes.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code* § 18-29-6.

Grievants assert PCBE has violated *W. Va. Code* § 18A-4-8(m) which states:

No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

Grievants assert the failure of PCBE to continue to pay them for wait time is a violation of this Code Section as their pay was decreased. This assertion is incorrect. Unlike the facts in *Sargent v. Putnam County Board of Education*, Docket No. 06-40-229 (Oct. 23, 2006), Grievants' assignments were changed, as PCBE no longer required bus operators to remain on-call between their runs. Now,

they are free between runs to use the time for their own purposes. The fact that Grievants were paid to be on-call for one year did not create a future entitlement to reimbursement when they are not on-call. Thenonrelegation clause would be misapplied to require payment for work which is not performed.

Neither was the action in violation of *W. Va. Code* § 18A-4-16(3) or (6), which provides:

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

(6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article.

Grievants have been allowed to retain the assignments held during the previous year. Further, the terms and conditions of the agreement between the employee and the board are in writing and signed by both parties. Grievants understandably are not happy with the change in duties, and subsequently their pay, but they retain the option of accepting the modified contracts or not bidding on the extracurricular assignments.

Grievants have not met their burden of proof of this issue, and they have not established a violation of *W. Va. Code* § 18A-4-8(m) or § 18A-4-16. Because Grievants are no longer required to remain at a designated location and to be “on-call” between extracurricular runs, they are no longer entitled to the payment they received for that time.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving

her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). *See W. Va. Code* § 18-29-6.

2. The nonrelegation clause does not prohibit contractual changes necessary to the effective administration of the school system, and does not entitle employees to compensation for work which is no longer required.

3. Grievants have not met their burden of proof and established a violation of *W. Va. Code* § 18A-4-8(m) or § 18A-4-16.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Putnam County. Any 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. However, the appealing party is required by *W. Va. Code* § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JANUARY 18, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.In addition to Mr. Sargent, Grievants are Bob Lanham, Roger Doneff, Sherry Tabor, Charles Smith, Debbie Shantie, Anthony Clark, Wendy Kester, Carl Burdette, Linda Hardway, Roger Casto, Cora Combs, Robert Thompson, Karen Richardson, Bessie Casto, James Henson, and Larry Jackson.

Footnote: 2

[2]Grievants did not pursue the alleged violations of W. Va. Code §§18A-2-5, 18A-2- 6a or 18A-2-8, and these are determined to have been abandoned.