WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BESSIE CASTO and

JAMES HENSON,

Grievants,

v. Docket No. 06-40-245

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Bessie Casto and James Henson ("Grievants"), employed by the Putnam County Board of Education ("PCBE") as bus operators, filed a grievance on May 17, 2006, in which they alleged violations of *W. Va. Code* §§ 18-29-2; 18A-4-5b; 18A-2-7; 18A-4-8b; 18A-4- 16(6) and 18A-4-8(m) when their extra-duty contracts were amended. For relief, Grievants seek reinstatement of the assignment they held during the 2005-2006 school year, back pay and benefits. This grievance was denied at Levels I and II. Grievants bypassed consideration at Level III. A Level IV hearing was held at the Grievance Board's Charleston office on November 9, 2006. Grievants were represented by John Roush, Esq., West Virginia School Service Personnel Association, and PCBE was represented by counsel, Gregory W. Bailey, Esq., of Bowles, Rice, McDavid, Graff & Love. The grievance became mature for decision on December 1, 2006, upon the parties submissions' of Proposed Findings of Fact and Conclusions of Law.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants are employed by PCBE as bus operators. 2. Grievant Casto has been a bus operator for approximately twenty-five years. For approximately the last ten years, she has had one extracurricular bus run.

3. Grievant Henson has been a bus operator for approximately thirty years. He has held three

extracurricular bus assignments. One of the extracurricular bus runs was a shuttle run, transporting children from Buffalo High to George Washington and then taking them back. The other two extracurricular runs are vocational runs.

4. Grievant Henson has performed the shuttle run for approximately twenty-five years. He has performed the two vocational runs for approximately six years.

5. Prior to the 2004-2005 school year, PCBE bus operators were compensated at varying amounts for extra-duty assignments. Some bus operators, including Grievants, were paid on a 200-day basis for the extra assignments, which included compensation for days the runs were not completed, such as school closings, or if the employee was sick. Other bus operators who were employed on an “as needed” basis were paid only for thedays they actually completed the run.

6. In May 2004, PCBE took action to uniformly compensate bus operators for extra-duty assignments. Specifically, a rate of $10.00 per run of an hour or less, and $10.00 per hour for all runs in excess of one hour, was paid effective September 7, 2005. 7. During the 2005-2006 school year, PCBE continued to employ four bus operators, including Grievants, under a 200-day extra-duty assignment.

8. Grievants did not have written extracurricular contracts.

9. In March 2006, the 200-day bus operators were notified that their extra-duty runs were being eliminated, and would be re-established on an “as-needed” basis. On May 1, 2006, PCBE approved the recommendation following a hearing requested by Grievants.

10. The action of PCBE also discontinued compensating Grievant Henson for the shuttle run for the 2006-2007 school year, though he was to continue performing the duties associated with the assignment.

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 (2000); *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 contend they are entitled to the extra-duty assignments under the same terms and conditions which applied during the 2005-2006 school year, *i.e.,* with compensation for the runs

whether they are needed or not on any given day. PCBEasserts that the changes were necessary to ensure all bus operators were being compensated uniformly for extra-duty assignments.

Grievants point to two statutes which he believes are pivotal to the outcome of this case. First, *W. Va. Code* § 18A-4-16(6) which provides, in pertinent part:

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.

Second, is the so-called “non-relegation clause” of *W. Va. Code* § 18A-4-8(m), which provides, in pertinent part:

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.

PCBE does not dispute that Grievants' assignments did not change between the 2005-2006 and 2006-2007 school years, but asserts the action was proper to ensure compliance with *W. Va. Code* §18A-4-5b, which contains language providing that:

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 . . .

In addition, the Grievance Board has addressed this issue in the case *Sargent v. Putnam County Bd. of Educ.*, Docket No. 06-40-229 (Sept. 25, 2006). In that case, Johnny Sargent was employed by PCBE as a bus operator. Mr. Sargent had two extracurricularassignments. He had held the first run since 1996, and the second run since 2000. He was paid on a 200-day basis, just as Grievants Casto and Henson. PCBE then attempted to increase Mr. Sargent's hourly compensation and eliminate the

extracurricular runs and re-establish them on an “as-needed” basis, which is exactly what occurred in this instance. The Grievance Board held PCBE violated the non-relegation clause of *W. Va. Code* § 18- 29-7, and the grievance was granted.

While PCBE concedes the case appears to provide authority favoring Grievants, it argues that, “absent a showing that a disparity in a local salary schedule for extracurricular contracts had its genesis prior to the effective date of the grandfather language contained in *Code* § a8A-5-5b, the uniformity requirements contained in the statute prohibit the perpetuation of the disparity.”

PCBE also relies on a Decision issued by the State Superintendent of Schools on November 30, 1982, in the matter of *Fike v. Pritt.* In that case, the Preston County Board of Education reduced Ms. Fike's $46.00 monthly supplement as a custodian but increased all service employees' supplement by $30.00, to equalize the supplement paid to all service personnel. Because there had been no real salary reduction, the Superintendent determined there had been no violation of *W. Va. Code* § 18A-4-8.

PCBE has expressed valid concerns that employees be treated uniformly, and not in a discriminatory manner. However, in *Crock v. Harrison County Bd. of Educ.,* 211 W. Va. 40, 560 S.E.2d 515 (2002), a case substantially similar to the present matter, the West Virginia Supreme Court of Appeals held that the non-relegation clause prohibits a board of education from terminating an employee's contract and reissuing it with altered compensation. In that case, the board had attempted to reissue the grievants' contractswithout the previously granted credit for prior experience which had been incorporated into their salaries. The Court noted that, since there were no changes in the employees' employment terms or the positions they held, taking this action merely to alter their salaries was clearly prohibited by the statute. Such is the case here. (See footnote 1)

PCBE correctly states that Grievants did not show being paid on a 200 day basis was in place prior to the implement of the uniformity provision. However, due to established precedent it is clear that because the extracurricular assignments are for the same positions with a reduced salary, this reduction in salary comes squarely within the prohibited acts specified in the non-relegation clause, and PCBE is not permitted to alter Grievants' compensation for performing the identical assignments they performed during the previous school year, pursuant to the provisions of *W. Va. Code* § 18A-4-8(m). Grievants are entitled to the relief requested, *i.e.* compensation under the previous year's terms for performance of their extra-duty assignments.

With respect to the shuttle assignment Grievant Henson performed, PCBE objected to that issue as not being addressed in the statement of grievance. Grievant Henson's counsel argued the grievance is concerning the elimination of contracts and submission under another term. The undersigned has reviewed the statement of grievance, and agrees with Grievant in this instance. Therefore, Grievant is entitled to compensation forthe shuttle run under the previous year's terms for performance for his extra-duty assignments.

The following conclusions of law support this discussion:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving his 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 (2000); *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. Pursuant to the provisions of *W. Va. Code* § 18A-4-8(m), a board of education is prohibited from terminating an employee's contract and reissuing the contract with altered compensation terms, if the employee is serving in exactly the same position as the previous school year. *Crock v. Harrison County Bd. of Educ*., 211 W. Va. 40, 560 S.E.2d 515 (2002).

3. Grievants have proven by a preponderance of the evidence that PCBE acted in violation of the non-relegation clause of *W. Va. Code* § 18A-4-8(m), when it altered the compensation provisions of their extra-duty contracts.

Accordingly, this grievance is **GRANTED**, and PCBE is **ORDERED** to reinstate the 200- day compensation held by Grievants on the extracurricular runs, along with Grievant Henson's shuttle run prior to the 2006-2007 school year, with back pay and interest.

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) daysof 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: February 28, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

[2]*In Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994), the Court recognized an exception to the non-relegation clause exists when a board of education reissues contracts to employees with different terms at reduced salaries. The exception in Lucion was expressly based on the fact that the new contracts issued had reduced employment terms. Due to the change in employment terms, it was determined that the new positions were not the same as the positions previously held by the affected service personnel. The present case does not fall under this exception since there were no changes in the employment terms of either of Grievant's contracts.*