THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN M. WIMMER,
Grievant,

v. **Docket No. 2008-1812-BraED**

BRAXTON COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, John M. Wimmer, filed a grievance against his employer, Braxton County Board of Education, on June 10, 2008. The statement of grievance reads, "Denied mileage that I was told by Mike McCoy and Carolyn Long I would receive. Trying to hold back pay on extra-curricular [sic] runs I made and was paid on the way I was told I would be paid since I did not have a regular run at the time to report to." For relief, Grievant seeks, "15 days pay and all legal fees paid."

The level I conference was held and a decision was issued on July 9, 2008, granting Grievant's mileage reimbursement in the amount of $155.56, yet holding Grievant was overpaid when Respondent allowed him to be paid for extracurricular runs that occurred when Grievant was supposed to be on his regular bus run. Grievant was ordered to immediately reimburse Respondent in the sum of $474.61, calculating the amount of overpayment reduced by the mileage. Grievant was denied "all legal fees."

Grievant then initiated a level II appeal on July 21, 2008, and filed another grievance form stating both his grievance and relief sought more specifically. His statement of grievance at level II reads:

> Mileage reimbursement of $155.56 that Michael C. McCoy said I would receive and signed off on and have not received. Carolyn Long and Michael C. McCoy agreed to pay me for extracurricular runs without the 3 ½ hour deductions taken

> on morning or even [sic] runs as long as I was not on a regular run to report to. Now I am being asked to reimburse the Braxton County Board of Education for this amount paid when the deductions were not taken off.

For relief, Grievant requested, "To keep the amount paid on extra-curricular runs as told I would be paid. To receive the $155.56 mileage payment that Michael C. McCoy said I would receive." Mediation in this case was unsuccessful, and Grievant appealed to level III.

A level III hearing was held on May 29, 2009, at the Grievance Board's Charleston office. Grievant was represented by Eric M. Gordon, Esq., Berry, Kessler, Crutchfield, Taylor & Gordon, and Respondent was represented by Rebecca M. Tinder, Esq., Bowles Rice McDavid Graff & Love. This case became mature on June 26, 2009, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant asserts he should not be required to pay any money back to Respondent for the extracurricular runs he drove while he was prohibited from performing his regular duty run. He argues that since he was not allowed to perform his regular duty run, there is no reason to deduct for a substitute driver. In addition, Grievant asserts he was told by the Superintendent he would not have to take the deductions.

Respondent avers that W. VA. CODE §6B-2-5(1) prohibits public employees from receiving double compensation for performing two assignments during the same hours, unless such compensation is reduced on a *pro rata* basis. Respondent asserts allowing Grievant to keep the overpayment is a violation of the law. Respondent further argues that, even though Grievant was not allowed to perform his regular duty run for a period of time, Grievant was still assigned that morning and afternoon run and was paid for those runs, though a substitute drove them. Lastly, Respondent does not contest Grievant was told he would not have to take

the deductions for the extracurricular runs. Respondent asserts that given the uniqueness of this specific situation, incorrect information was provided to Grievant. However, Respondent avers it attempted to correct the issue as soon as it became known.

Grievant has not carried his burden in this matter. This grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.

2. On November 11, 2007, Carolyn Long, the Superintendent, suspended Grievant pending an investigation into an allegation of misconduct. At the conclusion of the investigation, Ms. Long recommended to the Board of Education that Grievant be terminated.

3. On April 9, 2008, the Board rejected Ms. Long's recommendation. Instead, it reduced Grievant's unpaid suspension to three weeks, and further directed that he not drive his assigned route.[1]

4. Grievant's employment contract remained intact and was not altered in anyway.

5. Upon receiving the Board's decision, Grievant was told to report to the bus garage and remain there for his seven hour shift.

6. After three days, Grievant was advised that, instead of sitting at the bus garage for seven hours a day, he could call in for assignments.

7. During the time Grievant was returned from suspension but prohibited from driving his assigned route, he was paid for his full seven hour shift, regardless of whether he drove any runs during the day.

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[1]The Board believed Grievant should be prohibited from driving his assigned route because the student involved in the allegation of misconduct remained as a passenger on the bus.

8. During the time Grievant was returned from suspension but prohibited from driving his assigned route, a substitute bus operator drove Grievant's assigned route.

9. During the time Grievant was returned from suspension but prohibited from driving his assigned route, Grievant was permitted to step up into other runs during the absence of the regular bus operator assigned to the runs.[2] Grievant was also allowed to remain in the regular rotation and take extra duty assignments.

10. Extra duty runs in Braxton County take place at various times during the day and may overlap with the bus operator's regular run hours. If the extra duty run conflicts with either the morning or the evening run, a 3 ½ hour deduction is taken from the operator's pay. If the extra duty run conflicts with both the morning and evening run, a 7 hour deduction is taken from the operator's pay.

11. Grievant was advised by both Mike McCoy, Assistant Superintendent in charge of transportation, and Ms. Long that he would receive his full pay, and in addition, full hourly pay for the extra duty runs, regardless of whether the extra duty runs overlapped with the time he would have been performing his regular runs.

12. Grievant was paid for the approximate two hours in the morning and/or the two hours in the afternoon he would have driven his regular run and the hours for the extra duty run he performed during the exact same hours.

13. Grievant was paid a total of eight times for trips that overlapped his regular run. The overpayments occurred on the following dates at the following amounts: April 15, 2008, $128.02; April 16, 2008, $128.02; April 17, 2008, $64.01; April 22, 2008, $64.01; April 30,

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[2]During the testimony, Grievant was referred to as a super substitute.

2008, $64.02; May 1, 2008, $64.01; and May 7, 2008, $64.07. The overlapping payment totals $630.17.

14. All regular bus operators in the county are required to take the deduction if an extra duty run overlaps their regular run. Almost all other regular bus operators filed a grievance alleging, among other things, disparate treatment relating to the more favorable manner with which Grievant was compensated.

15. Grievant's situation, being returned to work but prohibited from driving his regular run, was a new and novel situation for this county and perhaps the entire State.

16. When Respondent began to review the method of payment for extra duty runs for Grievant and the applicable law, Grievant was advised a correction would be made, and he would be expected to pay the overage back to the county.

17. Grievant presented no evidence supporting the claim of being owed fifteen days pay or legal fees.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

This situation is clearly one of first impression. Grievant was originally suspended with a recommendation of termination. The Board declined to terminate, and instead placed him

back to work with a prohibition of driving his assigned route. It is during this time that Grievant took extra duty assignments that overlapped with the regular route he was prohibited from driving. There is no dispute that initially Grievant was told by the Superintendent that he would not have to take the standard deduction if an extra duty route overlapped with his regular route, as he was not driving his regular route. Other bus operators became upset and filed a grievance. While it is not exactly clear, it can be gleaned that this grievance caused a review of the manner in which Grievant's extra duty runs were being paid.

W. VA. CODE §18A-4-8a(j) states, "the minimum hourly rate of pay for extra duty assignments as defined in section eight-b of this article shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment and paid entirely from local funds." Grievant was paid within the parameters of this code section.

W. VA. CODE §6B-2-5(l) states:

> A public employee may not receive additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours unless:
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> (A) the public employee's compensation from one public employer is reduced by the amount of compensation received from the other public employer;
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> (B) the public employee's compensation from one public employer is reduced on a pro rata basis for any work time missed to perform duties for the other public employer;
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> (C) the public employee uses earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment; or
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> (D) a part-time public employee who does not have regularly scheduled work hours or a public employee who is authorized by one public employer to make up, outside of regularly scheduled work hours, time missed to perform the duties of another public office or employment maintains time records, verified by the public employee and his or her immediate supervisor at least once every pay period, showing the hours that the

public employee did, in fact, work for each public employer. The public employer shall submit these time records to the Ethics Commission on a quarterly basis.

Respondent argues this code section prohibits public employees from receiving double compensation for performing two assignments during the same hours, unless the compensation is reduced on a *pro rata* basis. The statute specifically references an employee working for two different public employers and getting paid by both for overlapping hours. However, the undersigned does believe the crux of the statute is to prevent an employee from receiving double compensation.

With that being said, Grievant's stated relief sought at level III is 15 days pay and legal fees. While there is no dispute he was paid for overlapping hours, Grievant has the burden of proof in this matter. There is no evidence of 15 days of pay Grievant should have received but did not. To the contrary, there is overwhelming evidence that he was paid for the route he was prohibited from driving, as well as all the extra duty runs he performed, even when they overlapped with the regular run. Evidence was presented that Grievant was paid eight times for extra duty runs overlapping his regular run. The undersigned is at a loss to determine the 15 days to which Grievant is referring.

Grievant was granted mileage at level I. However, that amount was used to offset the overpayment. This ruling will not be disturbed at level III and was not contested by Respondent. Grievant does admit he received money for overlapping runs. Respondent does not contest Grievant was told that, unlike every other bus operator in the county, he would not have to take the deduction. Only upon review of Grievant's pay, did the problem become clear.

It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. *Dickson v. Dep't of Env. Protection Div. of Personnel*, Docket No. 03-DEP-381 (Apr. 14, 2004); *Rush v. Kanawha County Bd. of Educ.*, Docket No. 02-20-362 (Feb. 28, 2003); *Ollar v. W. Va. Dep't of Health and Human Serv.*, Docket No. 92-HHR-186 (Jan. 22, 1993). These decisions are based on rulings by the West Virginia Supreme Court of Appeals which have held that, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2*, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.,* 179 W. Va. 605, 328 S.E.2d 356 (1985). Also, "[a]ny other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling,* 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), *citing Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983).

When it comes to the overpayment, this may not be the appropriate forum to allow Respondent to collect the overpayment. The grievance system is established to settle employment issues filed by employees. As has been stated, Grievant has the burden of proof, and it would seem counterintuitive to find that he has the burden of proving he does not owe the overpayment. Clearly Grievant was provided with incorrect information which is understandable given the uniqueness of the situation. However, that misinformation does not entitle him to keep the overpayment. The collection of the overpayment is left to either an agreement by the parties or direction from another forum.

Grievant also requests reimbursement for all legal fees. It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June21, 1996). New West Virginia Code § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense." In addition, no evidence was presented on the issue of legal fees.

Grievant has failed to sustain his burden of proof. Therefore, his request for 15 days pay and reimbursement of all legal fees is DENIED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. W. VA. CODE §18A-4-8a(j) states, "the minimum hourly rate of pay for extra duty assignments as defined in section eight-b of this article shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment and paid entirely from local funds."

3. Grievant was paid in accordance with W. VA. CODE §18A-4-8a(j).

4. W. VA. CODE §6B-2-5(l) states:

A public employee may not receive additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours unless:

(A) the public employee's compensation from one public employer is reduced by the amount of compensation received from the other public employer;

(B) the public employee's compensation from one public employer is reduced on a pro rata basis for any work time missed to perform duties for the other public employer;

(C) the public employee uses earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment; or

(D) a part-time public employee who does not have regularly scheduled work hours or a public employee who is authorized by one public employer to make up, outside of regularly scheduled work hours, time missed to perform the duties of another public office or employment maintains time records, verified by the public employee and his or her immediate supervisor at least once every pay period, showing the hours that the public employee did, in fact, work for each public employer. The public employer shall submit these time records to the Ethics Commission on a quarterly basis.

5. It is well-settled that a supervisor's promises cannot be binding against an agency where the supervisor does not possess the authority to actually make that determination. *Dickson v. Dep't of Env. Protection Div. of Personnel*, Docket No. 03-DEP-381 (Apr. 14, 2004); *Rush v. Kanawha County Bd. of Educ.*, Docket No. 02-20-362 (Feb. 28, 2003); *Ollar v. W. Va. Dep't of Health and Human Serv.*, Docket No. 92-HHR-186 (Jan. 22,

1993). These decisions are based on rulings by the West Virginia Supreme Court of Appeals which have held that, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2*, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.,* 179 W. Va. 605, 328 S.E.2d 356 (1985). Also, "[a]ny other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling,* 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), *citing Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983).

6. Grievant was paid for overlapping hours, creating a substantial overpayment.

7. W. VA. CODE §6C-2-6(a) provides, "any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses."

8. Grievant has failed to sustain his burden of proof.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: August 6, 2009

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Wendy A. Campbell Elswick
Administrative Law Judge