WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GARY SHOULDIS, et al,
Grievants,

v. **Docket No. 2011-1888-CONS**

JACKSON COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Bus operators Gary Shouldis and Blaine Milan (Grievants) filed separate grievances against the Jackson County Board of Education ("Board"), Respondent. Grievant Shouldis filed on April 18, 2011. Grievant Milan filed on May 5, 2011. Grievants protest the calculating method used by Respondent to determine extra-duty pay. Grievants contend that Respondent's new implemented method violates W. VA. CODE § 18A-4-8a(j). Both seek, as relief, to have the Board return to the old way of calculating pay for extra-duty assignments, plus compensation for all lost wages, with interest.

At level one of the grievance procedure, separate hearings were conducted by the Board's Superintendent. Grievant Shouldis' level one hearing was held on May 6, 2011. Grievant Milan's hearing was conducted on May 24, 2011. Concluding that the challenged new way of calculating extra-duty pay is lawful, the Superintendent denied all relief in separate level one decisions issued on June 8, 2011. Grievants appealed to level two of the grievance procedure, where the cases were consolidated. A level two mediation was conducted on November 4, 2011. Upon appeal by Grievants to level three, an evidentiary

hearing of the consolidated case was held before the undersigned Administrative Law Judge on April 3, 2012, in the Grievance Board's Charleston office. Grievants were represented by John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by its attorney, Howard Seufer, Jr., Bowles Rice McDavid Graff & Love LLP. At the conclusion of the level three hearing, it was agreed that the parties could mail proposed findings of fact and conclusions of law documents. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or before May 2, 2012. Both parties submitted fact/law proposals.

Synopsis

Grievants, regular full-time bus operators, contend that Respondent has erred in calculating their extra-duty pay. West Virginia Statute expressly addresses the compensation to be paid to service employees, such as bus operators, for extra-duty assignments, see W. VA. CODE § 18A-4-8a(j). In order to determine the hourly rate to be paid to a service employee for making an extra-duty assignment, it is first necessary to know the amount of the individual's daily total salary. That figure is then multiplied by one-seventh to determine the hourly rate of pay for a bus operator's extra-duty work. The term "daily total salary" is not defined by the statute. The parties disagree as to the correct method of establishing "daily total salary."

Grievants, bearing the burden of proof in this non-disciplinary grievance, have failed to establish by a preponderance of the evidence that Respondent, Jackson County Board of Education, has violated W. VA. CODE § 18A-4-8a(j) with its method of computing the rate of pay for extra-duty assignments. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Gary Shouldis and Blaine Milam, Grievants, were employed by Respondent as regular full-time bus operators at the time the instant grievance arose. Subsequent to that time, Grievant Shouldis has retired (effective July 1, 2011), Grievant Milan remains employed as a full-time bus operator.

2. By letter received on or about April 5, 2011, Grievants were advised by the payroll department that Respondent would no longer be using the extracurricular assignment compensation in calculating the daily salary for purposes of calculating the employees' extra-duty assignment compensation, except when the employee actually performed the extracurricular assignment on the day that the extra-duty assignment was performed. This change took place with the trips for which bus operators received compensation on the pay check accompanying the letter (March 6 through March 19, 2011).[1]

3. Grievant Shouldis had three extracurricular assignments at the time of the change in the method of calculating extra-duty assignment pay rates, and held these assignments through his retirement at the end of the 2010-2011 school year. Grievant

[1] In Grievants' opening statement at the level three hearing, Grievants' counsel expressly abandoned the argument that even if the Board's new way of calculating extra-duty pay is lawful, it could not lawfully implement the change during a school year without some prior due process. Thus, such argument will be deemed abandoned and not addressed by this decision.

Shouldis' regular assignment as a bus operator ran from 6:20 a.m. to 7:50 a.m. and 2:45 p.m. to 4:55 p.m.

4. Grievant Shouldis' extracurricular assignments included two VoTech runs, one in the morning (8:05 a.m. to 8:50 a.m. and 10:45 a.m. to 11:30 a.m.) and one in the afternoon (11:50 a.m. to 12:30 p.m. and 2:20 p.m. to 3:05 p.m.). Grievant Shouldis also had a "Patch" run, four days a week, Monday through Thursday (4:45 p.m. to 6:15 p.m.) roughly sixty percent of the time. Grievant Shouldis performed the Patch run six weeks in a row, then he would not perform it for approximately four weeks.

5. At the time the grievance was filed, Grievant Milan had two extracurricular assignments. He acquired a third extracurricular assignment at the beginning of the 2011-2012 school year. Grievant Milan's regular assignment as a bus operator runs from 6:15 a.m. to 7:50 a.m. and 3:10 p.m. to 4:45 p.m.

6. Grievant Milan's extracurricular assignments include two VoTech runs, one in the morning (8:05 a.m. to 8:50 a.m. and 10:30 a.m. to 11:20 a.m.) and one in the afternoon (11:40 a.m. to 12:25 p.m. and 2:30 p.m. to 3:10 p.m.). Grievant Milan also received the "Patch" run previously performed by Grievant Shouldis after the latter's retirement at the end of the 2010-2011 school year. The terms and conditions of this run are approximately the same for the 2011-2012 school year as they were for the previous year.

7. At all relevant times, Grievants, as regular bus operators, also held extracurricular contracts under which they made extracurricular bus runs. Under the terms of those extracurricular contracts, Grievants made their extracurricular runs on an "as-needed" basis. Each Grievant was paid a stipend of $25 for each time he actually made

an extracurricular run. However, under their extracurricular contracts, neither grievant was paid a stipend for an extracurricular run for a day on which the extracurricular run was not needed and, therefore, was not made.

8. Extracurricular runs are not always needed, in which case, Grievants were not paid the daily $25 stipend for the runs not made.

9. Vocational Technical Center runs were not needed on days of the 200-day employment term when students were not present, nor on days when the schedule for students did not require transportation to the Vocational Technical Center. Additionally, in Grievant Shouldis' case, the afterschool Patch program run was intermittent. During the school year, the Patch program would be held for six consecutive weeks, four days per week, necessitating Grievant Shouldis' services only on Monday through Thursday afternoons. Each such six-weeks of afterschool Patch runs were followed by a period of four consecutive weeks when the afterschool run was not needed and Grievant Shouldis did not make (or get paid for) that run.

10. A school statute expressly addresses the compensation to be paid to service employees, such as bus operators, for performing extra-duty assignments. W. VA. CODE § 18A-4-8a(j) provides:

> The minimum hourly rate of pay for extra duty assignments as defined in section eight-b [§ 18A-4-8b] 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 . . .

Thus, in order to determine the hourly rate to be paid to a service employee for making an extra-duty assignment, it is first necessary to know the amount of his or her "daily total

salary." That figure is then multiplied by one-seventh to arrive at the hourly rate of pay for a bus operator's extra-duty work.

11. A regular full-time 200-day service employee's "daily total salary" consists of the annual salary the individual is entitled to be paid under his or her regular full-time 200-day contract, divided by 200. If the regular full-time 200-day service employee holds no extracurricular contracts, then the hourly rate he or she is to be paid for performing an extra-duty assignment is one-seventh of the daily rate of pay so calculated.

12. For many years, and without any policy or other direction from the Board, the Board's Finance Department, in determining a regular bus operator's extra-duty hourly rate, first calculated the employees daily rate of pay. It did so by adding together:

> (a) the bus operator's daily rate under his or her regular 200-day contract as explained in Finding of Fact 11, *above*, and
>
> (b) the daily stipend the bus operator was to be paid for each and every extracurricular run he or she held a contract to make, *regardless of whether the bus operator in question actually made an extracurricular run on the day of the extra-duty run.*

The resulting daily rate of pay was then divided by seven to determine the hourly rate the employee was to be paid for performing an extra-duty assignment.

13. For Grievant Shouldis, this meant that his hourly rate for extra-duty work was one-seventh of the sum of:

> (a) his daily rate under his regular 200-day contract as explained in Proposed Finding of Fact 12, *above*, and
>
> (b) $75 ($25 for each of his extracurricular assignments), *regardless of whether he actually made all three of those extracurricular runs on the day of the extra-duty run.*

14. For Grievant Milan, this meant that his hourly rate for extra-duty work was one-seventh of the sum of:

> (a) his daily rate under his regular 200-day contract as explained in Proposed Finding of Fact 12, *above*, and
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> (b) $50 ($25 for each of his extracurricular assignments), *regardless of whether he actually made both of those extracurricular runs on the day of the extra-duty run.*

15. In early 2011, the Board's Finance Office was first advised that in the case of bus operators like Grievants, it was paying more for extra-duty bus runs than required by W. VA. CODE § 18A-4-8a(j). The Board had not knowingly authorized paying more than the minimum hourly rate under the statute.

16. Assistant State Superintendent of Schools, Joseph Panetta, advised that if a regular bus operator holds an extracurricular contract that pays a stipend only for days when the bus operator actually makes the extracurricular run, then that stipend need not be considered in determining the bus operator's compensation for making an extra-duty trip on days the bus operator does not make the extracurricular run.

17. After receiving and confirming the Assistant State Superintendent's advice, the Board's Finance Office immediately changed the way it calculates the hourly rate of pay for extra-duty bus runs. As a result, if a bus operator makes an extra-duty run on a day when he or she does not make a particular extracurricular run, the daily stipend for that extracurricular run is no longer included in calculating the daily rate of pay. In such instances the effect is to reduce the daily rate of pay for that day and, therefore, to reduce the extra-duty hourly rate that results from dividing the daily rate of pay by seven.

18. The new calculation, which went into effect for extra-duty assignments performed on and after March 6, 2011, reduced Grievants' hourly extra-duty rate of pay on days when they did not make their extracurricular assignments. With reference to the examples set forth in Findings of Fact 13 and 14, *above,* this means that part b of each example would include $25 stipends for only those extracurricular runs made on the same day as the extra-duty run.

19. Bus operators were informed of this alteration in the calculation of their extra-duty pay by a memorandum, signed by Laura Matheny, Business Manager/Treasurer, placed with their individual paycheck of April 5, 2011, see lower level record. The April 1, 2011 Memorandum, regarding "Rate Calculation for Extra Duty Trips" provides, in part;

> I recently became aware of an error in the calculation we have used to determine hourly rates for extra duty trips. In the past, the daily amounts paid for extracurricular routes were included in determining the extra duty rate regardless of whether or not the extracurricular route was actually driven on the day of an extra duty trip.
>
> West Virginia Code 18A-4-8a (j) requires that the minimum hourly rate of pay for extra duty assignments be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment. Extracurricular routes are hired on an as needed basis and paid only on days that the extracurricular duties are actually performed. Therefore, the amount paid for the extracurricular routes should only be included in the calculation of the extra duty rate for trips on days the extracurricular route is actually driven.
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> This correction was implemented for the April 5, 2011, payroll checks which covered days worked from March 6 through March 19, 2011. Because this was an administrative error, no retroactive corrections will be made.

(Lower level record, Exhibit 4.)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievants do not challenge the fact that their extracurricular contracts were on an "as-needed" basis. They do not challenge the fact that they were paid the $25 stipend per extracurricular run actually made. Nor do they take issue with the fact that they were not paid for extracurricular runs not taken. The issue presented by this consolidated grievance, concerns regular full-time 200-day service employees, like Grievants, who also hold, and are compensated for, extracurricular contract assignments. How does their extracurricular pay, (e.g., the $25 daily stipend paid to each of the grievants for performing each of their extracurricular duties) figure into the "daily rate of pay" (and, therefore, into the hourly rate) for making extra-duty assignments?

The central issue of this grievance is whether or not the total daily salary calculation is to include compensation for extracurricular assignments on days when that assignment is not performed.

Grievants contend that Respondent's new method of calculation violates the extra-duty pay statute, W. VA. CODE § 18A-4-8a(j). In support, they cite the Grievance Board's decision in the case of *Terek v. Ohio County Board of Education,* Docket No. 91-35-365 (Mar. 4, 1992). *Terek* established that a bus operator's daily rate of pay is not limited to an employee's daily rate for his or her regular full-time duties, but also should take into account the extracurricular assignments he or she performs.

In denying relief, the Respondent's Superintendent also cited prior decisions of the Grievance Board in *Miller et al., v. Lincoln County Board of Education,* Docket No. 93-22-082 / *Skeens et al., v. Lincoln County Board of Education,* Docket No. 93-22-124 (Sept. 29, 1993), which provided that the "total daily salary" for purposes of W. VA. CODE § 18A-4-8a(j) includes all wages earned by a bus operator "during the day" as a result of "the performance of both normal and supplemental assignments." Respondent maintains the fact that a bus operator does not perform an extracurricular duty and is, therefore, not paid for an extracurricular duty on a given work day should have a bearing on the "total daily salary" for that day.

West Virginia Code expressly addresses the compensation to be paid to service employees, such as bus operators, for performing extra-duty assignments. W. VA. CODE § 18A-4-8a(j) provides:

> The minimum hourly rate of pay for extra duty assignments as defined in section eight-b [§ 18A-4-8b] 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 . . .

The term “daily total salary” is not defined by statute. Nor does the context in which the term is used in the above referred Code section guide one in determining how the phrase should be interpreted. However, this Grievance Board has specifically held that one's daily total salary should reflect all wages earned throughout the entire day regardless of the source of those funds; from regular driving duties or from driving supplemental assignments. *Terek v. Ohio Co. Bd. of Educ.*, Docket No. 91-35-365 (Mar. 4, 1992). Additionally, *Miller et al., v. Lincoln County Board of Education,* Docket No. 93-22-082 / *Skeens et al., v. Lincoln County Board of Education,* Docket No. 93-22-124 (Sept. 29, 1993), further elaborates that the “total daily salary” for purposes of W. VA. CODE § 18A-4-8a includes all wages earned by a bus operator “during the day” as a result of “the performance of both normal and supplemental assignments.”

Miller stated the rule in a way that bases the hourly extra-duty pay on the regular pay, plus any extracurricular pay that the employee earned *on the day of the extra-duty run*. Conclusion of Law No. 2 in *Miller* reads

> “The term ‘total daily salary’ should be calculated to include an employee's wage or salary earned throughout the entire day whether via the performance of a normal a.m. and p.m. assignment solely or by a combination of the performance of both a normal assignment and a ‘supplemental assignment.’”

The undersigned Administrative Law Judge agrees with the consistent interpretation of his predecessors. The fact that a bus operator does not perform an extracurricular duty and is, therefore, not paid for an extracurricular duty on a given work day has a bearing on the “total daily salary” for that day. Relevant to the instant case, a bus operator is only paid for extracurricular runs actually made, if the extracurricular run is not made every day, and/or the bus operator is paid for the extracurricular run on some days, but not on others,

then his "total daily salary" will not be the same every day. Respondent has chosen to use, in calculating the minimum extra-duty hourly rate, the bus operator's "daily rate of pay" for the day on which the extra-duty work was performed. This is reasonable.

"The minimum hourly rate of pay for extra-duty assignments . . . shall be no less than one seventh of the employee's daily total salary . . .." W. VA. CODE § 18A-4-8a(j) Thus, for the parties, the crux of this dilemma is and remains what is the proper computation of total daily salary, be it a daily, weekly, quarterly or school year equation. It is not established nor is it found to be contrary to applicable code or case law to compute the hourly rate to be paid to a service employee for making an extra-duty assignment, as proposed and implemented by Respondent.

[I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999). Simply, this administrative law judge does not have the authority to second guess Respondent's operating policy unless contrary to an applicable rule, regulation or law.

Grievant, bearing the burden of proof in this non-disciplinary grievance, has failed to establish by a preponderance of the evidence that Respondent, Jackson County Board of Education, has violated applicable W. VA. CODE § 18A-4-8a(j) or prior case law with its newly implemented method of computing the rate of pay for extra-duty assignments.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)." Syllabus Point 4, *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

3. W. Va. Code § 18A-4-8a(j) provides:

> The minimum hourly rate of pay for extra duty assignments as defined in section eight-b [§ 18A-4-8b] 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 . . .

4. The term "total daily salary" should be calculated to include an employee's wage or salary earned throughout the entire day whether via the performance of a normal a.m. and p.m. assignment solely or by a combination of the performance of both a normal assignment and a "supplemental assignment." *See Miller et al., v. Lincoln County Board of Education,* Docket No. 93-22-082 / *Skeens et al., v. Lincoln County Board of Education,* Docket No. 93-22-124 (Sept. 29, 1993).

5. The minimum hourly rate of pay for extra-duty assignments shall be no less than one seventh of the employee's daily total salary. The plain language of applicable statute, and the apparent intent of the legislature, is that if a regular bus operator holds an extracurricular contract that pays a stipend only for days when the bus operator actually makes the extracurricular run, then that stipend need not be considered in determining the bus operator's compensation for making an extra-duty trip on days the bus operator does not make the extracurricular run.

6. Grievants have not proven by a preponderance of the evidence that the Jackson County Board of Education has violated W. VA. CODE § 18A-4-8a(j) by its method of computing the rate of pay for extra-duty assignments.

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: October 3, 2012

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Landon R. Brown
Administrative Law Judge