THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEITH COOK et al.,
Grievants,

v. **Docket No. 2012-0224-CONS**

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, Keith Cook and Wayne Salmons, are employed by Respondent, Lincoln County Board of Education. On July 15, 2011, Grievants filed this grievance against Respondent for changing the rate of pay for School Bus Trainers from 1/7th of the daily rate to $15.00 per hour. For relief, Grievants sought "[t]o [b]e [paid] 1/7 of our [d]aily [r]ate [f]or [t]raining Bus Drivers same as they have [d]one [f]or 6 years."

Following the August 8, 2011 level one conference, a level one decision was rendered on August 29, 2011, denying the grievance. Grievants appealed to level two on September 7, 2011. At level two, the statement of grievance and relief sought were changed: "On or about July 1, 2011 Respondent began a new rate of pay ($15 per hour) for the employees who train bus operators without notice and opportunity for hearing or consent. Previously, Respondent had paid these employees at the extra-duty assignment rate. Grievants allege a violation of 18A-2-6, 18A-2-7, 18A-4-8(m) & 18A-2-12a. Grievants [seek] resumption of the previous rate of pay for bus operator trainers and compensation for any lost wages with interest." Grievants perfected the appeal to level three of the grievance process on December 6, 2011, changing the statement of grievance and relief sought to: "Grievants allege that Respondent reduced their compensation for work as bus trainers from their extra-duty assignment rate of pay

to $15 per hour without their consent or notice and opportunity for hearing. Grievants allege a violation of W.Va. Code 18A-2-6, 18A-2-7, 18A-4-8(m) & 18A-2-12a. Grievants seek return to the previous rate of pay for bus trainers, i.e., the extra-duty assignment rate, and compensation for lost wages with interest."

A level three hearing was held on April 13, 2012, before Administrative Law Judge Carrie H. LeFevre[1] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent was represented by counsel, Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision on May 15, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants allege Respondent reduced their compensation for work as Bus Operator Trainers from their extra-duty assignment rate of pay to $15.00 per hour without their consent or notice and opportunity for hearing. The Bus Operator Trainer position was posted as an extracurricular assignment for $15.00 per hour. After Grievants were awarded positions as Bus Operator Trainers, they were instead paid the higher extra-duty rate for approximately eight months, at which time Respondent asserts it became aware of this mistake in pay and corrected the pay to the posted amount. Grievants argue Respondent violated the statute regarding transferring school personnel. Respondent did not violate this statute as Grievants were not transferred.

[1] This case was assigned to the undersigned Administrative Law Judge on August 20, 2012, for administrative purposes.

Grievants also argue that the non-regulation clause prevents Respondent from reducing Grievants rate of pay. Respondent did not violate the non-regulation clause. There was no reduction in rate of pay because the rate of pay was $15.00 per hour as per the posting, not the pay actually received, and $15.00 per hour is the pay to which Grievants consented and were entitled. Respondent asserts the payment of the higher extra-duty pay was simply a clerical mistake. Grievants argue that it was the posting and the contract that were the mistakes, and not the pay. However, Grievants failed to prove this contention by a preponderance of the evidence and failed to present legal argument as to how Respondent violated law or policy in doing so.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are currently employed by Respondent, Lincoln County Board of Education as Bus Operators. The position held at the time of the grievance, and regarding which the grievance was filed, was Bus Operator Trainer. Bus Operator Trainers are now employed by RESA[2], outside of the purview of Respondent.

2. In August 2010, Respondent posted three Bus Operator Trainer positions under the Extra Curricular Service and at the rate of pay of $15.00 per hour.[3]

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[2] Regional Education Service Agency. These multi-county agencies were created by statute "to provide for high quality, cost effective education programs and services to students, schools and school systems." W.VA. CODE § 18-2-26(a).

[3] Respondent's Exhibit # 1.

3. Both Grievant Cook and Grievant Salmons bid, knowing that the rate of pay was $15.00 per hour, and were awarded positions as Bus Operator Trainers in addition to their regular positions as Bus Operators.

4. Grievant Cook signed a contract that stated the pay was for $15.00 per hour.[4] Grievant Salmons did not sign a contract.[5]

5. Grievants began work as Bus Operator Trainers in October 2010, and were paid the extra-duty pay of 1/7th of their daily rate, rather than the posted extracurricular pay of $15.00 per hour.

6. Through June, 2011, Grievants continued to work as Bus Operator Trainers and be paid at the rate of 1/7th of their daily rate.

7. Beginning July 1, 2011, without notice to Grievants, Respondent changed the pay to $15.00 per hour as was previously listed in the job posting.

8. Gary Nelson was also a Bus Operator Trainer. He had worked for Respondent for thirty years in various positions. At the time Grievants were hired as Bus Operator Trainers, Mr. Nelson was employed with Respondent as a Bus Operator, Area Supervisor, and Bus Operator Trainer. As pay for Bus Operator Trainer, he received 1/7th of his daily rate as pay, and the position was characterized as extra-duty, not as extra-curricular. Mr. Nelson retired on June 30, 2011, which was the same time Respondent changed Grievants pay from the 1/7th all had been receiving, to the $15.00 per hour as posted.

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[4] Respondent's Exhibit # 2.

[5] Respondent's Exhibit # 3.

9. Bus Operator training was a duty performed as needed when new Bus Operators were hired or when an existing Bus Operator was required to have refresher training. Time for training was worked out informally between the Operator and the Trainer and was done around each other's regular schedule.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The 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, the party bearing the burden has not met its burden. *Id.*

Grievants argue that Respondent set the compensation for Bus Operator Trainer at the extra-duty assignment rate of 1/7th of the daily rate of pay, and, having done so, cannot reduce that rate without following the provisions of W.VA. CODE § 18A-2-7. Grievants contend further that it may be impossible for Respondent to ever lower Grievants' rate of pay less than 1/7th of the daily rate due to the provisions of W.VA. CODE § 18A-4-8(m).

W.VA. CODE § 18A-2-7 grants the superintendent, subject to the approval of the board, the right to "assign transfer, promote, demote, or suspend school personnel" and

delineates the procedure and requirements for transferring school personnel. This code section has no bearing on the instant case. Grievants presented no evidence that they were transferred. Prior to the July 1, 2011 grieved event, Grievants were Bus Operator Trainers, and after July 1, 2011, Grievants were still Bus Operator Trainers for the same area. There was no transfer; there was only a change in Grievants' pay from 1/7th of the daily rate to $15.00 per hour. The question is why that change was made and if Respondent violated any law or policy in doing so.

Turning to that question, it is necessary to examine W.VA CODE § 18A-4-8(m), also referred to as the non-regulation clause, which states:

> Without his or her written consent, a service person may not be: (1) Reclassified by class title; or (2) 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 for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

For this statute to apply, Grievants must prove that there was a reduction in their rate of pay. Grievants were first hired as Bus Operator Trainers in October 2010. Neither had served as a Bus Operator Trainer prior to that time. The posting for the Bus Operator Trainer listed the position as extracurricular, and listed the rate of pay as $15.00 per hour. Grievants bid on the position knowing the rate of pay was $15.00 per hour. Grievant Cook then signed a contract for that rate of pay. Grievant Salmons did not sign a contract, but testified he was aware that the rate of pay was to be $15.00 per hour and submitted his bid knowing it was $15.00 per hour. Despite the posting and contract, Grievants were paid the *extra-duty* pay of 1/7th of their daily rate and not their *extracurricular* pay of $15.00 per hour. Respondent's payment to Grievants of the

extra-duty pay was not their rate of pay; it was simply the pay they received. Grievants' rate of pay was extracurricular pay of $15.00 per hour as listed in the posting and to which they agreed by accepting the position. Therefore, there was no reduction in rate of pay, because the rate of pay was $15.00 per hour as per the posting, not the pay actually received, and $15.00 per hour is the pay to which Grievants consented and were entitled.

Respondent explain the payment to Grievants of extra-duty pay from October 2010 through June 2011 was a clerical mistake that was discovered and corrected effective July 1, 2011. Grievants respond that it was the posting and the contract that were the mistakes, and not the pay. However, Grievants failed to prove this contention by a preponderance of the evidence and failed to present legal argument as to how Respondent violated law or policy in doing so. In this, Grievants appear to attempt to shift the burden to Respondent to prove its actions were justified. As this is not a disciplinary action, Respondent is not required to justify its action. Grievants presented no evidence that the $15.00 per hour listing in the posting and the contract were a mistake. While the timing of the change of pay immediately after the retirement of Mr. Nelson is suspicious, and it is also suspicious that the mistake in pay in this case kept Respondent from running afoul of the requirement of uniformity in pay, suspicion is not proof. If the posting itself violated some law or policy, then Grievants should have grieved the posting, or presented legal argument regarding that contention in the instant grievance.

Further, although not cited by the parties, the Grievance Board has addressed issues similar to this case in previous cases. *See Toney v. Lincoln County Bd. of Educ.,*

Docket No. 2008-0533-LinEd (October 31, 2008), *Straight, et al. v. Kanawha County Bd. of Educ*., Docket No. 2008-0832-CONS (December 8, 2008). In both *Toney* and *Straight*, a school board incorrectly paid an employee at a higher rate of pay than that which had been advertised in the job posting and then corrected the pay. In each case, the Grievance Board found that the school board could and should correct the mistake in pay, and that doing so did not violate the non-regulation clause.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "The 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).

2. W.VA. CODE § 18A-2-7 grants the superintendent, subject to the approval of the board, the right to “assign transfer, promote, demote, or suspend school personnel” and delineates the procedure and requirements for transferring school personnel. This statute does not apply to the instant case as Grievants were not transferred.

3. W.VA CODE § 18A-4-8(m) states:

> Without his or her written consent, a service person may not be: (1) Reclassified by class title; or (2) 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 for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

Respondent did not violate this statute. There was no reduction in Grievants' rate of pay, because the rate of pay was $15.00 per hour as per the posting, not the pay actually received, and $15.00 per hour is the pay to which Grievants consented and were entitled.

4. Grievants did not prove by a preponderance of the evidence that Respondent was mistaken in the posting and contract rather than in the pay. If the posting itself violated some law or policy, then Grievants should have grieved the posting, or presented legal argument regarding that contention in the instant grievance.

5. Previous cases of the Board have found a school board did not violate the non-regulation clause when it incorrectly paid an employee at a higher rate of pay than that which had been advertised in the job posting and then corrected the pay to that listed in the job posting. *See Toney v. Lincoln County Bd. of Educ.,* Docket No. 2008-0533-LinEd (October 31, 2008), *Straight, et al. v. Kanawha County Bd. of Educ*., Docket No. 2008-0832-CONS (December 8, 2008).

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: September 24, 2012

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Billie Thacker Catlett
Administrative Law Judge