PAMELA R. SMITH

v. Docket No. 93-15-358

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Pamela R. Smith, had been employed by Respondent Hancock County Board of Education (HCBE) as a substitute bus operator for approximately three years at the time she filed a written level one grievance on June 2, 1993. She alleges HCBE practiced favoritism and violated W.Va. Code §18-29-2(o) when it failed to assign her a certain substitute driving assignment at the time it became available and instead placed a less-senior substitute operator in the position. She seeks lost compensa tion and benefits. (See footnote 1)

Findings of Fact

1. On January 12, 1993, Grievant began driving for a Mrs. Pugh, a regular driver with a five and three-quarter hour "contract," who was absent from her assignment on bus route No. 36. Grievant held that job through February 23; Mrs. Pugh returned to work the following day.

2. Beginning late January 1993, substitute driver Gary Long assumed route No. 11, a seven hour assignment held by Dorothy Dawson, a regular bus operator who was absent due to a work-related injury.

3. Following her loss of the route No. 36 assignment in late February 1993, Grievant, who is more senior than Mr. Long, contacted Charles Pugh, HCBE's transportation supervisor, about whether route No. 11 should be offered as a long-term substitute position since the regular driver had been absent beyond twenty days. (See footnote 2) Mr. Pugh did not "get back" to Grievant on the issue as he promised.

4. During the week of March 15 through 19, 1993, Grievant was working as a substitute bus operator on bus route No. 22, replacing Diane Zirkle, who was absent due to illness.

5. Sometime in March 1993, Ms. Dawson's position on route No. 11 was offered as a temporary assignment to the most senior regular driver. Mrs. Pugh, route No. 36's regular driver, accepted the route No. 11 "temporary" position and began the run on March 22 or 23, 1993. 6. Ms. Pugh's movement to route No. 11 displaced Mr. Long, who had driven that route for approximately thirty-seven days, and left her regular driving route without an operator. At that

juncture, HCBE simply assigned Mr. Long to drive Ms. Pugh's regular route.

7. When Grievant reported to work on Monday, March 22 to continue her assignment on Ms. Zirkle's route, she was informed that Ms. Zirkle had returned to work that day. Ms. Zirkle had previously informed transportation officials that she would return to work March 22.

8. On several occasions in Spring 1993, including some days before and after March 22, Grievant indicated to transpor tation officials that she was not interested in short-term, day- to-day assignments in certain locations because of difficulty in reaching the job sites.

9. About a week after Grievant had been relieved of the assignment on Ms. Zirkle's route, she learned that Mr. Long and Mrs. Pugh had, in effect, switched driving assignments. Grievant promptly contacted Mr. Pugh and asked why she had not been given the route No. 36 assignment vacated by Mrs. Pugh. Mr. Pugh's immediate response was that she, Grievant, had been scheduled to drive Zirkle's route at the time the vacancy on route No. 36 became available.

10. Grievant later learned from Ms. Zirkle that she (Ms. Zirkle) had informed the transportation office of her intent to return to duty on March 22. Thereafter, Grievant again contact ed Mr. Pugh on several occasions about the propriety of Mr.Long's having the long-term assignment on route No. 36. At some point the rationale changed as to why Grievant had not been called to take route No. 36. She was advised that she had not been called for that assignment because she had previously declined offers to drive in the area covered by the route. Grievant continued to pursue her claim with Mr. Pugh.

11. By letter dated May 12, 1993, Mr. Pugh essentially advised Grievant that, because she was the most senior substi tute, she could have the driving assignment on route No. 36 (Ms. Pugh's regular run), effective May 14, 1993, until the regular operator's leave for route No. 11 "expired" or was posted for other reasons. Presumably, Mr. Long was then returned to the substitute rotation pool.

12. Grievant accepted Mr. Pugh's offer and began driving the run on May 14. At some point, she learned that she was not receiving the full benefits of "regular" employment. Her attempts to resolve this situation were not successful.

13. Grievant then requested a formal grievance conference with Mr. Pugh on May 25, 1993 (T.43), and filed a written level one grievance on June 2, 1993, seeking back wages and other benefits.

At the lower grievance levels, Grievant initially contended that she should have been awarded route No. 11 in February 1993 and requested a retroactive award of relief to that time. At level four she agreed that Mrs. Pugh had properly obtained that run on March 23. She then modified her grievance and the relief sought and focused her claim only upon the route No. 36 assignment temporarily vacated by Mrs. Pugh. Therefore, in this action, Grievant challenges HCBE's assignment of Mr. Long to route No. 36 on or about March 22, 1993.

Grievant essentially argues that when Ms. Zirkle returned to work and Mrs. Pugh assumed the driving route held by Mr. Long on approximately the same day in March 1993, both she and Mr. Long were actually displaced and newly available for long-term driving assignments. Grievant argues that because her seniority exceeds Mr. Long's, HCBE should have awarded route No. 36 to her in March instead of waiting until May 14. Grievant contends that the placement of Mr. Long into Mrs. Pugh's temporarily vacated position amounted to an act of prohibited favoritism on HCBE's part.

HCBE urges that the grievance should be denied because Grievant did not timely file a grievance and did not demonstrate any statutory violations. HCBE then argues that Grievant was either not available or presumably not interested in driving route No. 36 when it became temporarily vacated. According to HCBE, Grievant had been scheduled to work on Ms. Zirkle's route the day route No. 36 became available and that, in March 1993, Grievant had declined day-to-day substitute work in the same general geographical area covered by route No. 36. HCBE also urges that the earliest time a determination could be made by school officials that Ms. Dawson's absence would be prolonged was in May 1993. Finally, HCBE argues that it was bound to give Mrs. Pugh's regular driving assignment to Mr. Long because route No. 11's regular driver had not yet returned to duty. The facts in this case establish that HCBE both violated W.Va.Code §18A-4-15 and impermissibly favored Mr. Long. Al though neither party cited or specifically relied upon any portion of §18A-4-15, (See footnote 3) that statute must be examined first in this matter because it describes the procedure for the employ ment and assignment of substitute service personnel. In partic ular, Code §18A-4-15(2) provides that a substitute shall be assigned

To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set

forth in. . .[§18A-4-8b]. . .. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position[.]

This proviso is somewhat unclear as to how certain situationsshould be resolved. (See footnote 4) However, it would appear that, if an employee has requested and been approved for a formal leave for a specified time of thirty days or more, the board of education must immediately fill the position with a substitute pursuant to Code §18A-4-8b and then grant regular employee status within twenty days of the leave's commencement.

If, on the other hand, an employee embarks upon an extended sick leave due to illness or a work-related injury and provides no inkling as to the duration of the leave, basically the situation which occurred in this case, then the board has no immediate duty to fill the position under §18A-4-8b. However, after thirty days have transpired from the commencement of the leave, the board must then act to more permanently fill the position pursuant to §18A-4-8b. At that juncture, then, the substitute hired under this provision "shall hold such position and regular employee status," including all "rights, privileges and benefits" until the regular employee returns.

As can be determined from the record, HCBE normally places the most senior available substitute driver in long-term driving assignments which continue beyond thirty days. Although Code §18A-4-15 has a proviso for job exchanges between a substituteand a regular employee, (See footnote 5) regularly-hired bus operators have no "right" under the statute to substitute for an absent driver because these employees generally do not work in a building or otherwise share a common work site. (See footnote 6) Nevertheless, HCBE appar ently does permit its regular bus operators to, in effect, "swap" jobs with a substitute who has been employed on a long- term basis when the regular driver's route and working day "contract" brings in less revenue than the absent operator's.

Under the circumstances, when Grievant first contacted HCBE's officials in February 1993 about the route No. 11 driving assignment, HCBE should have placed her on the run and permitted Mrs. Pugh to displace her by "bumping" her into Mrs. Pugh's regular driving assignment on route No. 36. This explains why Grievant did not dispute the placement of Mrs. Pugh, but only the fact that she was not the one who gained Mrs. Pugh's tempo rarily vacated run.

Therefore, with respect to the time in March when HCBE finally heeded Grievant's complaints that Ms. Dawson's run had not been properly allotted and gave it to Mrs. Pugh, both Mr. Long and

Grievant were then available to assume Mrs. Pugh's run. While it is true that Grievant had refused some short-term driving assignments in certain geographic areas both before and after March 23, 1993, Grievant's uncontroverted testimony established that she had notified transportation officials that she would not decline any long-term assignments in those same locales.

In addition, HCBE's assertion that it did not know until May that Ms. Dawson's absence would be "prolonged" lacks merit. (See footnote 7) HCBE was well aware in March 1993 of Ms. Dawson's very prolonged absence because it initially offered Dawson's seven-hour route to Mrs. Pugh on that basis alone. Finally, HCBE's argument at level four that it had been obligated in March to retain Mr. Long because Ms. Dawson had not yet returned to work also lacks legal support. In fact, if HCBE had been compelled to retain Mr. Long in March 1993, it would have had no basis to displace Mr. Long with Grievant in May either because, at that point, Ms. Dawson still had not returned to work on route No. 11 thus freeing Mrs. Pugh to return to route No. 36. HCBE simply should not have allowed Mr. Long to hold the route No. 11 job past thirty days.

Given the circumstances in this case, Grievant should have been assigned to route No. 36 on or about March 22, 1993. Without a doubt, HCBE favored Mr. Long by permitting him toretain a form of long-term employment well past the time when Grievant should have been placed in either route No. 11 or in route No. 36. This action resulted in the loss of wages and benefits for Grievant. (See footnote 8)

HCBE's assertion that the grievance was untimely filed must now be addressed. The problem here is that HCBE never offered any facts or information as to what point in time the grievance should have been filed. As can be determined from the record, it appears that, at least from Grievant's perspective, three interrelated but separate, specific incidents occurred which could give rise to a grievance. The first incident involved HCBE's failure to either post Ms. Dawson's route or offer it to Grievant in February 1993. The second was HCBE's failure to award Ms. Pugh's route to Grievant in March 1993. The third was HCBE's failure to confer regular employee status upon Grievant in May 1993, when it finally permitted Grievant to assume Ms. Pugh's route.

It is true that Grievant did not promptly file a grievance on either occasion when she learned of Mr. Long's continuous substitute employment, first on route No. 11 in February andthen on route No. 36 in March. However, while Grievant had not been told she could not or should not file a grievance, she had been encouraged to believe a resolution to her ongoing com plaints about the matter could

come about through other means. Grievant testified that she approached Mr. Pugh many times about Mr. Long's driving assignment. On those occasions, Grievant was told by Mr. Pugh that he would "look into" things and/or she was given some form of slight or incremental relief all along the way until May when, finally, she received the driving assignment she had sought for many months.

Mr. Pugh did not deny Grievant's assertions. He stated that that he, in effect, kept an "open door policy" to settle disputes without invoking a formal grievance. This manner of handling work-related complaints could certainly foster delay on the part of a potential grievant. However, these circumstances are not enough to either toll or excuse the failure to file a timely grievance, especially since no promises were ever made to Grievant that the situation would be rectified in her favor. See, e.g., Gaskins v. W.Va. Dept. of Health, Docket No. 90-H-032 (April 12, 1990), and cites therein. Even if the favoritism shown in this case could be regarded as a "continuing" viola tion, Grievant clearly did not timely file a grievance with respect to such a claim during the time Mr. Long held the jobs she sought, either in February or March and April 1993. (See footnote 9) On the other hand, HCBE's argument that the grievance should be denied in its entirety cannot be sustained. Notably, Grievant did not file a complaint when she received the May 12, 1993 notification that she could assume Mrs. Pugh's route. Apparently, Grievant was satisfied at that point that she had finally obtained relief on her protracted claim. The catalyst which sparked this grievance was Grievant's realization several weeks later that she had not been given regular employee status. Clearly, Grievant initiated her grievance within fifteen days after she began her assignment on May 14, and met the filing requirements of Code §18-29-4 with respect to the portion of her grievance which claimed a right to regular employee status.

Moreover, Grievant's claim on this portion of her grievance has merit. Grievant was entitled to regular employment status on May 14, 1993, because the substitute assignment in question was directly related to the absence of a regular employee whose leave had commenced more than twenty days previously. Code §18A-4-15(a). Therefore, on this issue or portion of her grievance, Grievant is entitled to relief in the form of an award of all wages and benefits due, beginning May 14, 1993, and continuing throughout the duration of the assignment.

In addition to the foregoing discussion, the following conclusions of law are made.

Conclusions of Law

1. With respect to the employment of a substituteworker to fill a vacant position created by the

long-term absence of a regular service employee, a board of education must, "within twenty working days from the commencement of the leave of absence,. . .give regular employee status to a person hired [pursuant to W.Va. Code §18A-4-8b] to fill such position." W.Va. Code §18A-4-15(2).

2. Grievant initiated a grievance on the issue of her employment status within fifteen days from the time the assign ment or "employment" began on May 14, 1993; therefore, she met the filing requirements of W.Va. Code §18-29-4.

Accordingly, the grievance is **GRANTED**, in part, and HCBE is Ordered to provide Grievant all of the benefits of regular employment in relation to her assumption of route No. 36 on May 14, 1993, including back payments of any wage differential which may be due, and paid holidays and related benefits, as neces sary. Any other relief is Denied.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and 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. Any appealing party must advise this office ofthe appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: March 31, 1994.

Footnote: 1 Adverse decisions were rendered at levels one and two on June 2 and August 23, 1993, respectively. Grievant appealed to level four on or about August 30, 1993 where hearing was held on September 23, 1993. Grievant submitted post-hearing fact/law proposals on October 21; HCBE waived its right to file a rebuttal by October 28, 1993.

Footnote: 2 Although of no importance to this case, the relationship, if any, of Mrs. Pugh and Charles Pugh, HCBE's transportation official, is not made known in the record.

Footnote: 3 W.Va. Code §18A-4-15 provides for substitute employment in case the regular employee is temporarily absent or on a more prolonged leave, whether paid or unpaid (subsections 1, 2 and 3), as well as to temporarily fill a "vacancy" caused by a regular employee's severance or suspension or by the creation of a new position (subsections 4, 5

and 6). The statute provides further specifics which govern the employment of substitute service personnel: Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assign ment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in. . .[W.Va. Code §18A-4-8b]. . .. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments[.]

Footnote: 4 Indeed, Code §18A-4-15 in its entirety is silent as to how certain work situations, such as long-term and short-term assignments, should be handled. While HCBE's method for allocating short term, day-to-day substitute assignments as opposed to long- term assignments was not clearly set forth in this case, it is noted that some other boards of education have devised separate rotating rosters for these two types of assignments.

Footnote: 5 The statute provides that when there are "regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position."

Footnote: 6 See Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993). See also Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992) (a bus operator's actual work site is, for all practical purposes, his or her own individual bus and/or driving route).

Footnote: 7 At level two, HCBE's counsel asked Grievant if she understood that "a leave doesn't exist as long as the driver has accumulated sick leave and wishes to use it in the department." Grievant responded, "Yes." T2.17. However, Code §18A-4-15(2) does not mention any situations in which boards of education are permitted to differentiate among various types of unpaid leaves with respect to the filling of the resultant vacated positions.

Footnote: 8 W.Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Favoritism involves disparate treatment of employees in which one or more employees are given preferential treatment over one or more other similarly-situated employees for no legitimate or work-related reason. Tabacsko v. West Virginia University, Docket No. 89-BOR-641 (July 31, 1990). HCBE did not establish a legitimate reason for its failure to place Grievant in Mrs. Pugh's temporarily vacated driving route in March 1993. In fact, HCBE unlawfully placed and kept someone other than Grievant on that job.

Footnote: 9 Basically, a Grievant who prevails on a favoritism charge must demonstrate she is entitled to the requested relief of lost wages. Kobily v. Hancock County Bd. of Educ., Docket No. 90-15-464 (Nov. 27, 1991). In this case, Grievant has not demonstrated that she is "entitled" to any lost wages. When she finally initiated this grievance in May1993, Mr. Long no longer held either of the assignments Grievant had previously sought.