VALERIE TIBBS, et al.

v. Docket No. 94-15-114

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants are thirty-four bus operators employed by Respon dent Hancock County Board of Education (HCBE). On or about March 30, 1994, they filed a level four grievance alleging, [HCBE] illegally reduced the amount of hourly compen sation that bus operators were paid for extra-duty trips and violated the law by refusing to call Hancock County bus operators to take extra[-]duty trips; that they had signed an agreement to do. Violation of (but not limited to) WV Codes: 18-29-2a; 18A-2-7; 18A-4- 5b; 18A-4-8; 18A-4-16. In order to resolve this grievance, we . . . are asking for: A. Restoration of extra-duty compensation as it was prior to July 1, 1993. B. Compensation for all extra-duty trips we were not called out for by the Trans. Dept. since Sept. 28, [19]93.

Valerie Tibbs has been selected as lead grievant. (See footnote 1) Grievantsherein bear the burden of proving that W.Va. Code §§18-29-2(a), (See footnote 2) 18A-2-7, 18A-4-5b, 18A-4-8, and §18A-4-16 have been violated in this case. Based upon all matters of record, it is determined that Grievants failed to meet their burden of proof. The following facts have been gleaned from the record:

Findings of Fact

1. Prior to the 1993-94 school year, HCBE paid its bus operators, all of which hold five and three-quarter hour daily contracts, an hourly extra-duty rate based upon their five and three-quarter per day hourly rate. HCBE's other service employ ees, including school bus aides, hold seven hour per day con tracts and were paid an hourly extra-duty rate based upon their seven hour per day hourly rate. Thus HCBE's bus drivers re ceived extra-duty wages in excess of those received by other service employees who held seven hour contracts.

2. At a regular meeting held on June 28, 1993, Superin tendent Daniel D. Curry presented and HCBE approved revised pay scales for bus operators, a component of which altered the compensation for extra-duty driving to reflect W.Va. Code §18A- 4-8a's directives that said rates be based upon one-seventh of an employee's daily rate. The revised method of calculating the bus operators' extra-duty rates caused a decline in the extra- duty wages of the five and three-quarter

hour drivers. However, the action unified the manner in which the hourly extra-dutyrate was determined for all service employees.

3. HCBE maintains and allocates two distinct types of extra-duty work for bus operators, "curricular" driving during the school day between 9:30 a.m. and 1:30 p.m., and "extracurricular" driving after the end of the school day or at 4:00 p.m. Drivers who wish to drive one or both must sign the appropriate roster sheets.

4. In late August 1993, prior to the start of the school year, bus operators attended an in-service meeting. Those who were interested in extra-duty curricular driving and extracur ricular driving signed their names to the separate roster sheets.

5. At the end of the August 1993 in-service meeting, Superintendent Curry met with the bus drivers and discussed at length the compensation revisions approved in June 1993, includ ing the extra-duty rate alteration. According to Grievant Tibbs, "Some people were upset about it . . .." T.10.

6. Shortly after the school year began, all but one of the drivers who had signed the extracurricular extra-duty driving roster began declining offers from the trip sheet when contacted by the transportation office.

7. Grievant Tibbs, a five and three-quarter hour driver, testified that she lost about $1.79 per hour when she drove an extra-duty run at the revised extra-duty rate. She admitted she declined driving offers made in October 1993.

8. An extraordinary amount of work was required in the transportation office to contact one driver after another due tothe drivers' ongoing and consistent refusals to take extra-duty trips. After a time, in late September 1993, the transportation supervisor posted a sign-up sheet for drivers who wished to be considered for up-coming driving assignments. (See footnote 3)

9. Apparently, none of the drivers signed the sheet. Grievant Tibbs stated she did not sign the sign-up sheet because she had signed the roster sheets before school began and had not removed her name from them. She said she did not know whether any of the other grievants signed it. T.17.

10. By late October, the transportation office no longer posted available driving assignments. Thereafter, the driver who had initially accepted the calls to perform extra-duty runs was given some assignments. Chartered buses were also used to transport students to various activities.

11. Altogether, from late September until early December 1993, (See footnote 4) all but one of HCBE's bus drivers either refused to take an extracurricular driving assignment or to contact the

trans portation office in writing to denote their availability to drive. The refusal of the bus drivers to accept extra-duty driving cause much chaos and concern within the transportationoffice. T2.76-78.

12. Although Grievants knew of the change in extra-duty rates either before school started or by the time they received their first paychecks of the school year which reflected the rate decrease, none filed a grievance on this issue prior to November 30, 1993. (See footnote 5)

Grievants offer a number of theories in support of their contention they are entitled to the restoration of the old extra-duty rate as well as back wages for assignments they purportedly lost, none of which have any merit. They allege the existence of an "unwritten contractual agreement" (See footnote 6) to pay the old rates and that HCBE unilaterally breached this "contract" without the benefit of the formal notice and hearing require ments of W.Va. Code §18A-2-7. Their argument is not factually supported or legally sound.

Grievants presented no evidence as to how, when or why it came to pass that HCBE paid its bus drivers an hourly extra-duty rate based upon those employees' five and three-quarter hour per day hourly rates to the detriment of other service employees,including school bus aides, whose hourly extra-duty rates were based upon their seven hour per day hourly rates. What is important is that HCBE's old method of calculating extra-duty rates for its bus operators gave those workers an unwarranted monetary advantage over the seven-hour per day service employ ees, an advantage not based upon merit, complexity of the assignment, seniority or any other legitimate reason. Code §18A-2-7 does not come into play in this situation at all. No drivers were transferred, terminated or suspended, and no regular employment contracts were altered in any manner.

Moreover, no violation of Code §18A-4-5b was shown. This statute deals with the reduction of "local funds allocated for salaries" which are used to supplement the state minimum sala ries for regularly employed personnel and has nothing at all to do with compensation standards for extra-duty work.

Grievants did not establish a violation of Code §18A-4-16 with respect to extra-duty compensation. Grievants likened their extra-duty work to that which is performed under an extracurricular contract pursuant to Code §18A-4-16 and insisted that said extracurricular contracts must be "reduced" via the notice and hearing procedures of Code §18A-2-7. T.5. However, the occasional extra-duty work described in §18A-4-8b, and at issue herein, is distinct from the ongoing, regularly-scheduled work contemplated by Code §18A-4-16. A separate contract of employment is

required for extracurricular work performed under §18A-4-16 while a separate contract is not required or needed for extra-duty work performed under §18A-4-8b. Grievants also failed to articulate how Code §18A-4-8 was allegedly violated, and the undersigned found no evidence of a violation of §18A-4-8 on HCBE's part. On the other hand, the record amply demonstrates that HCBE attempted to comply with the requirements of Code §18A-4-8b and 18A-4-8a in regard to the assignment of workers to extra-duty work and the rate of pay required.

In Fall 1993, Grievant essentially waived their opportuni ties for extra-duty work. The record in this case establishes that HCBE's bus drivers refused on numerous occasions to drive any extra-duty runs, for whatever reason, during most of October and November 1993. Under those circumstances, HCBE was not obligated to waste work time and public funds by way of endless telephone contacts to people who did not want to accept offers of extra work. Further, HCBE satisfied any obligations it had to call out workers for extra-duty work when it posted a new sign-up sheet, despite the fact that no workers affirmatively removed themselves from the initial roster sheets as Grievants claim. The workers who signed the original roster sheets were no longer reliable. Hence, Grievants are not entitled to compensation for any lost extra-duty work.

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

Conclusions of Law

1. Extra-duty assignments for service personnel are "irregular jobs that occur periodically or occasionally such as . . . filed trips, athletic events, proms, banquets and bandfestival trips." Service employees must be chosen to perform this extra-duty work on a most-senior, rotational basis. W.Va. Code §18A-4-8b.

2. Extracurricular assignments under Code §18A-4-16 are after-school, long-term assignments which provide support for students' events, activities or needs that occur on a regularly scheduled basis and for which a separate contract of employment is required.

3. Whether named "extracurricular" or "curricular" assignments as a means to designate the hours in which the duties occur, the assignments in issue herein are extra-duty assignments as contemplated by Code §18-4-8b.

4. Under W.Va. Code §18A-4-8a, "[t]he minimum hourly rate of pay for extra-duty assignments . . . shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved performing the assignment. . . . The salary for any fraction of an hour . . . shall be prorated

accordingly."

5. W.Va. Code §18A-4-5b requires a board of education to apply uniformity "to all salaries, rates of pay, benefits, increments or compensation for all [service personnel] perform ing like assignments and duties."

6. HCBE's former method of calculating hourly extra-duty rates for its five and three-quarter hour bus operators resulted in higher extra-duty rates for these employees than for seven hour employees and was violative of Code §18A-4-5b. The present method is uniformly applied and in conformance with the requirement of §18A-4-8a.

7. Grievants failed to prove any violations of W.Va. Code §§18A-2-7, 18A-4-5b, 18A-4-8, and §18A-4-16.

8. "No worker is guaranteed either occasional or long- term additional work beyond his or her regular employment. See Smith v. Ohio County Bd. of Educ., Docket No. 92-35-428 (Apr. 16, 1993)." Amerdes v. Hancock County Bd. of Educ., Docket No. 93-15-209 (May 26, 1994).

9. During the time period in question, Grievants waived any right they may have had for extra-duty employment when they steadfastly refused repeated offers of extra-duty work; there fore, they are not entitled to any back wages for jobs they could have had under the initial sign-up roster.

Accordingly, the grievance is **DENIED** in its entirety.

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 of the 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: June 7, 1994

Footnote: 1 A hearing scheduled for April 1994 was cancelled when the parties agreed to a record decision. The record

consists of the lower level pleadings and adverse decisions and the transcript of the February 24, 1994 level two hearing, hereinafter referenced, T._.

Footnote: 2 This statute may have been cited because of its definition of a grievance claim which includes, "aggrieved application of unwritten policies or practices of the board . . .."

Footnote: 3 Until the new sign-up sheet was posted in late September and perhaps for some time after, the transportation office maintained a weekly trip assignment sheet and contacted drivers daily by radio, phone, or in person to determine if anyone would accept available trips, despite continuing driver refusals.

Footnote: 4 According to the record, some of the affected bus drivers met informally on occasion to discuss the rate revision. One grievant denied that any "concerted activity" occurred. He said all the drivers made up their own minds whether or not they wanted to drive when called for an extra-duty assignment. Apparently, following some further meetings during the 1993 Thanksgiving holiday break, the drivers decided to accept extra-duty driving offers again.

Footnote: 5 HCBE raised a timeliness defense at level two on the issue of the extra-duty pay rate adjustment. Given the circumstances in this case, under Code §18-29-4(a)(1), the "event" giving rise to the grievance could be HCBE's act in June 1993 to amend the extra-duty pay rate, when Grievants first discovered the reduced wages in their paychecks in September 1993 or the "most recent occurrence of a continuing practice" on HCBE's part to pay Grievants a lesser amount for extra-duty work than it did in the past. Under the last theory, Grievants would be barred from recovering any lost wages for all periods of time prior to fifteen days of filing the grievance. See Allman v. Harrison County Bd. of Educ., Docket No. 89-17-215 (June 29, 1990), and cases following. Since Grievants did not prevail on the merits of their case, there is no need to explore this topic further.

Footnote: 6 See n.2, supra.