ELIZABETH PUGH

v. Docket No. 95-15-128

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, professionally employed as a teacher by Respon dent Hancock County Board of Education (HCBE), filed a level four grievance as follows:1

Violation of agreement occurred when hourly rate for professional services for Saturday school was changed without notification or permission. I am requesting back pay and continuation of initial payment until contract renewal.

HCBE maintains that the rate for the services Grievant performed is $12.00 per hour and that the initial salary Grievant received was a clerical error. The case became mature for decision on the last day for the completion of written, post-hearing argu ment, June 5, 1995.

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1Adverse decisions were rendered at level one on March 2, 1995, and at level two on March 21, 1995, following a March 13, 1995, evidentiary hearing. At the May 3, 1995, level four hearing, the parties merely supplemented the record adduced below.

The following facts are properly made from the record as a whole.

Findings of Fact

1. Prior to the beginning of the 1993-94 school year, HCBE established a "Saturday School" for students at Weir High

School (WHS) as an alternative to out-of-school suspension disciplinary measures.

2. While the students were expected to bring schoolwork to the Saturday session, the teacher's role was to supervise or monitor, not to instruct the two to five attending students.

3. Teachers who were interested in manning the four-hour Saturday sessions on a seniority-based, rotational system were invited to sign up for the Saturday School assignment.

4. After a roster of participants was formed, a formal job posting was produced for "Saturday School Teacher" (SST) at WHS with a listed salary of $12.00 per hour. Also included was the statement that the "number of teachers needed and how often the classes will be held will depend on the number of students." HCBE Ex 1 (3/13/95).

5. In Spring 1994, a similar procedure for Saturday School and SSTs was initiated for Oak Glen High School (OGHS). HCBE Ex 1 (3/13/95).

6. Grievant is a "Chapter I" teacher at Oak Glen Middle School (OGMS). At some point after the 1994-95 school year began, Grievant and others at OGMS expressed interest in Satur day School for their students.

7. Thereafter, OGMS Principal Donald Licker contacted Superintendent Daniel Curry and asked permission to initiate Saturday School at OGMS. Mr. Curry initially approved, but later asked that Mr. Licker request formal approval from HCBE. On November 1, 1994, Mr. Licker wrote to HCBE's members as follows:

This is a request to provide another option to school discipline. The following teachers have volunteered to chaperone the Saturday School program:

Liz Pugh [Grievant]

Bob McMahan

Doug Smith

Tom Piccirillo

Your approval is appreciated.

HCBE EX 1 (3/13/95).

8. A formal job posting never occurred for the SST positions at OGMS.

9. Prior HCBE's approval of Grievant as an SST, Grievant volunteered her services for the Saturday School at OGMS without compensation on at least three occasions, beginning in October 1994. T2.8.2

10. By letter dated November 15, 1995, Mr. Curry informed Grievant that HCBE had approved her assignment as an SST at OGMS "on an as-needed basis." HCBE EX 2 (3/13/95).

11. Grievant never asked any administrator or any other person in authority about the rate of pay for SST duties;

2According to Grievant, the number of students at Saturday School could vary from two to five, but another teacher would have to assist if more than five students were scheduled to attend.

rather, she asked an OGHS teacher and was told the sum was dependent upon certification and experience. T2.10-12.

12. On December 9, 1994, Grievant received her first paycheck for Saturday School duties, including compensation for the three days she worked prior to MCBE's approval. T2.8. The salary reflected Grievant's hourly rate of $20.49 and "met" Grievant's "expectations." T2.11-12.

13. In late 1994, Mr. Curry was advised by the business office that some SST personnel were being paid more than $12.00 per hour. Further inquiry revealed a clerical error resulting in overpayment to some SSTs. He ordered the payroll department to correct the error by the next pay period and to pay only the $12.00 hourly rate. Some SSTs who had previously received only $12.00 an hour neglected to report the overpayment. Mr. Curry stated that it never entered his mind to collect the overpayment from the persons who received the windfall. T2.22.

14. Sometime in early 1995, Grievant learned at a Secon dary Advisory Council meeting between faculty senate representa tives and Mr. Curry, that a clerical error had occurred with respect to the SSTs' hourly wages. T2.14.

15. Grievant's next paycheck, issued February 17, 1995 for one day's (four hours) work as an SST, contained the $12.00 hourly rate.

16. An OGHS teacher who is an SST, testified at level four that she received $12.00 per hour during the 1993-94 school year, but received her regular hourly rate at the beginning of the 1994-95 year. She said she did not question the reason for the extra money. Finally, the teacher from OGHS stated that she remained on the roster for OGHS's Saturday School program, despite the adjustment in early 1995 of her hourly wages to the initial $12.00 hourly amount.

17. Grievant presently holds an extracurricular contract as a tutor, for which she is paid her regular hourly wages. She claims she tutored a student at the Saturday School.

18. Tutoring and other formal instruction is not supposed to be conducted at Saturday School.

Discussion

A grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). Grievant's theory about why she should receive her hourly teacher's rate instead of the $12.00 per hour to perform SST duties rests upon an assertion that HCBE violated an "agreement" and "contract" regarding her hourly rate for SST duties, a misrepresentation under W.Va. Code 18-29-2(a)'s definition of a grievance claim. At the level two hearing, Grievant added the claim that the SST duties constitute an extracurricular assignment pursuant to Code 18A-4-16.
HCBE contends that the amount Grievant initially received was an overpayment due to a clerical error. Under the circum stances, HCBE argues, Grievant has no legal entitlement to receive remuneration in excess of that paid to other SSTs.
The initial payment Grievant received for the SST work was clearly an error or mistake. In Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987), the board of education issued a custodian a contract which mistakenly identi fied only one of his work sites; the contract was signed by the parties. Thereafter, the board discovered its mistake and issued the correct contract, but the worker protested the assignment to work at the alternate site and filed a grievance. The administrative law judge in that case ruled that the initial contract contained "a mistake of expression of one of [its] terms and was therefore unenforceable."
A similar situation involving an erroneous contract oc curred in Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989), and Crowder was applied. Although

Grievant's circumstance concerns an initial payment for SST duties containing a mistake, and not an executed contract con taining a mistake, the principles of Crowder apply. That Grievant's initial paycheck contained an error in the hourly amount, which was in excess of the wages others received for the same assignment, does not give Grievant an enforceable right to further wages at the mistaken amount.

In addition, Grievant's argument that her performance of SST duties constitutes an extra-curricular assignment is not supported by the evidence. The record reveals that the institu tion of Saturday School in various schools was a type of pilot program initiated by, and dependent upon, the volunteer efforts of the professionals within the school. This is an alternative to student suspensions which the teachers at the various schools have apparently embraced, with permission from relevant adminis trators and HCBE. No assignment is involved, and Saturday School is held on an as-needed basis. No teacher is forced to participate as an SST. Moreover, an SST can quit at any time without recourse on the part of HCBE or administrators. HCBE likened the assignment to an extra-duty assignment performed by service personnel, especially in regard to the unpredictability of need and due to the rotational nature of teacher participa tion.

Under those circumstances, the undersigned is not convinced that SST duties would fall within the scope of extracurricular assignments pursuant to Code 18A-4-16.3 This is not to say

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3Pertinent provisions of W.Va. Code 18A-5-16 are as follows:

(1) The assignment of teachers ... to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent ... subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

(2) The employee and the superintendent ... subject to board approval, shall mutually agree upon the maximum number or hour of extracurricular assignment in each school year for each extracurricular assignment.

(3) The terms and conditions of the agreement between the employee and the board ... shall be in writing and signed by both parties.

(4) An employee's contract of employment shall be separate from the extracurricular assignment agreement[.]

that HCBE is precluded from formalizing the program and offering extra-curricular contracts to willing workers sometime in the future. In any event, even if the job should have been covered by an extra-curricular contract, HCBE would not be obligated to pay Grievant or other SSTs their regular hourly wages or any hourly amount other than $12.00 per hour.4

In addition to the foregoing, the following formal conclu sions of law are appropriate.

Conclusions of Law

1. An error or mistake in computing a worker's wages does not give the worker an enforceable right to continue receiving the erroneous wages. See Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989).
2. Grievant has failed to establish a violation of any law, policy, rule or regulation in support of her wage-based claim.
3. "Grievant has failed to prove the essential elements of the grievance as a matter of law." Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987).

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4An extracurricular assignment requires an agreement as to hours, wages and other terms, which must be formalized in a written contract. Grievant's assertion in her level four fact/law proposals that de facto "maximum hours" had been set for SSTs is not persuasive. In addition, Grievant inexplicably spoke of a "contract renewal" in her grievance statement relative to her request for reinstatement of the erroneous wages paid to her for Saturday School hours. However, Grievant never held a contract for the SST job.
This grievance is, accordingly, 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 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 5, 1995.