JUDY TELLER AND TERRI NELSON,

Grievants,

v.

DOCKET NO. 98-15-299

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants are bus operators employed by the Hancock County Board of Education ("HCBOE"). They are challenging the compensation they received for an extra duty bus run on May 16 and May 17, 1998, and request that they be paid an hourly rate for 26¾ hours of work. This grievance was initiated at level one on June 8, 1998, and was denied by Grievants' immediate supervisor on July 6, 1998. (See footnote 1) A level two hearing was conducted on July 31, 1998, followed by a written decision by Dr. Charles Chandler, Superintendent, granting the grievance in part. Level three consideration was bypassed, and Grievants appealed to level four on August 13, 1998. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on October 9, 1998. Grievants were represented at all levels of this grievance by Owens Brown of the West Virginia Education Association, and HCBOE was represented by counsel, Willliam Fahey. This matter became mature for consideration on November 2, 1998, upon receipt of the parties' writtenpost-hearing submissions.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed as regular, full-time bus operators by HCBOE.

2. On May 7, 1998, Grievants accepted an extra-duty trip, which required two buses to take high school band students to Geauga Lake in Aurora, Ohio. The trip was scheduled for a weekend, beginning on Saturday and concluding on Sunday.

3. The Geauga Lake trip began on May 16, 1998. Grievants drove the students to a band competition at Cuyahoga Falls High School, which was followed by a picnic and awards ceremony at Geauga Lake Park. Grievants then drove the students to a nearby hotel, where everyone, including Grievants, spent the night.

4. Grievants stayed at Geauga Lake Park and waited for the students until it was time to leave that evening to go to the hotel.

5. On May 17, 1998, Grievants drove the students to Sea World at 9:30 a.m. Everyone met back at the buses at 5:00 p.m. for the trip home.

6. Grievants stayed at Sea World during the day on May 17, but they did not accompany or chaperone the students, as they were not required to do so.

7. HCBOE normally compensates bus drivers at an hourly rate for extra duty trips, which is based upon the employee's usual salary.

8. For the Geauga Lake trip, Grievants were paid their normal extra duty hourly rate for seven hours of driving time, plus a flat fee of $134.65. 9. The $134.65 flat fee was established by previous HCBOE administrations, and it was not adopted as an official policy by HCBOE.

10. For one-day extra duty trips, bus operators employed by HCBOE are compensated at the hourly rate for the entirety of the trip, including driving and waiting time.

11. At level two, Dr. Chandler found that Grievants were entitled to an additional 2½ hours of compensation, because the band director had asked them to allow the students to change clothes on the buses between 11:30 and 2:00 on May 16.

12. Grievants and other bus drivers for HCBOE had been instructed by the transportation supervisor to stay with their buses when on extra duty trips. He did not discuss or distinguish overnight trips when giving this directive.

13. Grievants spent a total of 26¾ hours on the Geauga Lake trip engaged in the activities of pre- or post-tripping their buses, driving, and waiting for the students. (See footnote 2)

Discussion

As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

Grievants argue that HCBOE's "practice" of paying bus drivers a flat fee forovernight trips is contrary to law and State Board of Education Policy 5300. Compensation for extra duty assignments is addressed in Code §18A-4-8a, which provides, in part:

> The 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 in performing the assignment and paid entirely from local funds: Provided, That **an alternative minimum hourly rate of pay for performing extra duty assignments within a particular category of employment may be utilized if the alternate hourly rate of pay is approved both by the county board and by the affirmative vote of a two-thirds majority of the regular full-time employees within that classification category of employment** within that county[.]

(Emphasis added). Grievants contend that the flat rate used by HCBOE is directly contrary to this provision, because there was no vote by the bus drivers nor any approval of this alternative method of pay by the Board. In addition, they argue that this method of compensation violates the requirement of Code §18A-4-5b that compensation be uniform for employees performing "like assignments and duties," along with State Board Policy 5300, Section 2.8, requiring all official personnel policies to be written and available to employees.

HCBOE counters that, under the Fair Labor Standards Act ("FLSA"), it is not required to pay Grievants, because the periods during which they were waiting were not "time worked" as discussed in the federal regulations. As a preliminary issue, the FLSA provides that employees must be paid a certain minimum wage for all hours worked (29 U.S.C. §206) and that employment in excess of a particular number of hours per week without overtime is prohibited (29 U.S.C. §207). (See footnote 3) Accordingly, further provisions of the Actattempt to explain how it is determined whether or not certain types of activities are to be considered compensable work time. Specifically with regard to "waiting time," the FLSA states:

> Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves 'scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.'

29 U.S.C. §785.14 (citation omitted). In a similar vein, 29 U.S.C. §785.16, regarding when employees are considered “off duty,” states:

> Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes **unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived**.

(Emphasis added.)

Applying the above principles, the FLSA does not prohibit HCBOE from compensating Grievants for the 26¾ hours of pay requested in this grievance. There is no evidence that Grievants were “relieved from duty” during the time periods in question, nor that anyone in authority told them in advance that they could leave the job during the students' activities. In fact, they had previously been told just the opposite, that they must stay near the bus on extra duty trips. Moreover, the facts in this case show that waiting was an integral and normal part of extra duty work, and this time had always been compensable in the past. Therefore, Grievants were clearly “engaged to wait” in thisinstance.

HCBOE's payment of a flat rate for overnight trips violates the uniformity provisions of Code §18A-4-5b. Since an hourly rate is paid for all other extra duty trips, the compensation for bus operators performing “like assignments and duties” is not uniform. The only difference between the two types of trips is the additional requirement that the employee spend the night away from home, and, in this case, Grievants are not seeking compensation for the time spent at the hotel. Therefore, it is a violation of the statute for HCBOE to refuse to also compensate Grievants at the hourly rate for all time spent preparing, driving and waiting for the students.

Respondent's “flat rate” for overnight trips is also an invalid policy. Pursuant to Code §18A-4-8a(8), cited above, such an alternative system of compensation for extra duty trips must be approved by both the board of education and the bus operators in Hancock County. Since this was not done, HCBOE is required to pay all bus drivers on extra duty assignments at least the minimum hourly rate

set forth in the same statute, and it is not permitted to unilaterally institute a flat rate.

In addition, Policy 5300 requires that “all official and enforceable personnel policies must be written and made available to every employee of each county board of education.” See Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). The only evidence of this so-called “policy” was a 1993 memorandum from the Chief School Business Official to the former Superintendent, explaining how the flat rate had been calculated since its initial use in 1981. There is no evidence that this proposal was ever presented to or adopted by theHCBOE, so it is not a valid and enforceable personnel policy. See Toothman v. Marion County Bd. of Educ., Docket No. 98-24-139 (Oct. 7, 1998).

Accordingly, the undersigned finds that Grievants are entitled to compensation at their usual extra duty hourly rate for a total of 26¾ hours for the trip of May 16 and 17, 1998. Consistent with this discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, Grievants bear the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. Whether waiting time is compensable under the FLSA depends upon particular circumstances of each case. 29 U.S.C. §785.14.

3. Under the FLSA, the time Grievants spent waiting for students on the Geauga Lake trip was compensable working time.

4. Code §18A-4-5b requires that compensation be uniform for employees performing “like assignments and duties.”

5. HCBOE's use of a flat rate of pay for overnight extra duty trips, while paying an hourly rate for the entirety of one day extra duty trips, violates the provisions of Code §18A-4-5b.

6. State Board of Education Policy 5300 requires that “all official and enforceable personnel policies must be written and made available to every employee ofeach county board of education.” See Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Conner v. Barbour County Bd. of

Educ., Docket No. 93-01-246 (Apr. 28, 1994).

7. HCBOE's policy of paying a flat rate for overnight extra duty trips was not a valid and enforceable personnel policy. See Toothman v. Marion County Bd. of Educ., Docket No. 98-24-139 (Oct. 7, 1998).

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to compensate Grievants at their usual hourly rate for extra duty trips for 26¾ hours, minus the compensation they have already received for the field trip to Geauga Lake.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Date: November 28, 1998 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants allege that the level one response was untimely. However, Grievants did not pursue appeal to the next level or victory by default, as provided by Code § 18-29- 3(a), when this occurred, so the undersigned is without authority to provide any relief in this regard at level four. A grievant who wishes to be granted relief by default must raise the issue when the alleged default occurs. Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 1997 W. Va. LEXIS 251, 496 S.E.2d 447 (1997).

Footnote: 2

Grievants are not requesting compensation for the period between the time they arrived at the hotel on Saturday evening until they began preparing their buses for departure from the hotel on Sunday morning.

Footnote: 3

The Grievance Board has determined that it has jurisdiction to decide issues which arise under the FLSA. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).