RICHARD JOHNSON, et al.,

Grievants,

v. **DOCKET NO. 01-43-509**

RITCHIE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants Richard Johnson, Richard Morrison and Peter Schumacher filed their joint grievance directly at Level II on or about July 27, 2001, grieving the pay for bus operators serving summer programs, "incorrect or incomplete language of the vacancy notices and contracts (See footnote 1) ," and "the lack of benefits being provided through these summer programs." Grievants seek "benefits, full day rate of pay (including high school diploma and college hours), holiday pay, leave accrual, and any other right, privilege, and benefit available."

At level I, Grievants were granted partial relief, in that Ritchie County Superintendent Dr. Richard Butler agreed to reform the language and compensation provisions in the Grievants' contracts, and to work on rewriting the relevant parts of the county's transportation policy.

A Level II hearing was held on August 29, 2001, and a decision denying the remaining grievance issues was issued September 13, 2001. Level III was bypassed, anda Level IV hearing was held in the Grievance Board's Morgantown office on November 15, 2001. WVSSPA Representative John E. Roush, Esq. represented Grievants and Howard E. Suefer, Jr., Esq. of Bowles Rice McDavid Graff & Love, PLLC represented Respondent. The parties agreed to submit their proposed findings of fact and conclusions of law by December 19, 2001, and the matter became mature for decision on that date.

Based on a preponderance of the relevant evidence contained in the lower-level record (See footnote 2) and adduced at the Level IV hearing, the following findings are made:

FINDINGS OF FACT

1. Grievant Peter Schumacher has been regularly employed by Respondent as a bus operator

for 15 years, and worked as a substitute bus operator for five years prior to that. For the summer of 2001, Mr. Schumacher was employed as a summer bus operator transporting students in the Energy Express program, a summer program that helps children with their reading skills and provides a nutritional meal.

2. Grievant Richard Arnett Johnson has been a regular bus operator for two years, and was previously employed as a substitute bus operator for one and three-fourths year. For the summer of 2001, Grievant Johnson was also employed as a summer bus operator transporting students in the CLEAR (See footnote 3) Summer Academy program, a summer academic program to help students in danger of failing to advance to the next grade.

3. Grievant Richard "Buck" Morrison has worked for Respondent as a substitute bus operator since the 2000 school year. For the summer of 2001, Grievant Morrison wasalso employed as a summer bus operator transporting students in the CLEAR Summer Academy program.

4. Grievants Morrison and Johnson were paid for the term July 2, 2001, through July 13, 2001, at a rate of $25 per day for the morning run and $25 per day for the afternoon run. For the term from July 16, 2001, through July 27, 2001, these grievants executed new but identical contracts.

5. Grievant Schumacher worked for a term from June 25, 2001, through August 3, 2001, and was paid at a flat rate of $72.85 per day.

6. The jobs in the CLEAR program were posted in 4 separate job postings: one each for the July 2-13 (See footnote 4) morning and afternoon runs, and one each for the July 16-27 morning and afternoon runs. Grievants executed separate contracts for each of the jobs posted. The contracts specified that the compensation would be at the "$25 per day for [morning or afternoon] run plus one day salary to set up and practice route."

7. The June 25-August 3 Energy Express position was posted as one job, and Grievant Schumacher executed one contract for the position. Compensation was specified as "$72.85 daily." The daily rate was equivalent to the minimum daily salary of a regular, full-time bus operator with no experience, per Respondent's salary schedule.

8. Grievant Schumacher was also hired under a separate posting for a bus operator position for the CLEAR Summer Transition Camp program for a term from August 15, 2001, through August 17, 2001. His contract for this assignment based compensationon the "Hourly Rate Based on WV Salary Scale-plus one day salary to set up and practice run."

9. Each of the contracts was titled, “Contract of Employment for Extracurricular Duty Assignment.”

DISCUSSION

Grievants are not alleging that there was any discrimination or favoritism when Respondent used two different methods to compensate for the CLEAR program and the Energy Express program, but instead allege that neither method meets the W. Va. Code requirements as set forth in § 18-5-39, and that the benefits that go along with regular employment, as granted by W. Va. Code §§ 18A-4-5b, -8, -8a, -10 and -14, should have been granted to them as summer employees. Because the allegations are unrelated to a disciplinary action, Grievants bear the burden of proving their charges by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. “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 and Human Resources, 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.

While the basic facts underlying Grievants' argument are undisputed, the applicable law is. Grievants first claim that W. Va. Code § 18-5-39(f) requires Respondent to pay Grievants as if they were full- or part-time employees based on W. Va. Code § 18A-4-8a. The Code cited by Grievants allows a school board to employer service personnel in the summer months in connection with a summer school program, for employment terms lessthan the minimum term required to employ service personnel during the regular school year. In pertinent part, it states:

> Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in [§ 18A-4-8] of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to [§ 18A-4-8b] of this code. When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to the employee for that summer position which shall be filled under the procedure set forth in section eight-b, article four, chapter eighteen-a of this code. The summer employee on leave of absence has the option of returning to that summer position if the position exists the succeeding summer or whenever the position is reestablished if it were abolished. The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights,

> privileges and benefits provided in [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14] of this code: Provided, That those persons are not entitled to a minimum employment term of two hundred days for their summer position.

W. Va. Code § 18-5-39(f) (2001). In essence, this section establishes that service personnel may be regularly employed during the summer months for an employment term of less than 200 days, and entitles personnel so employed to pay and certain benefits as if they were regularly employed during the normal school year. Most importantly for the purpose of this case, it requires those employees to be paid in accordance with W. Va. Code § 18A-4-8a(1) (2001), which states in part:

> The minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least theamounts indicated in the "state minimum pay scale pay grade I" and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the "state minimum pay scale pay grade I" set forth in this section: Provided, That beginning the first day of the second quarter of the employment term in the school year two thousand one-two thousand two the minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the "state minimum pay scale pay grade II" and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the "state minimum pay scale pay grade II" set forth in this section.

Grievants' argument is that they should be considered as either full-time or part-time employees, depending on whether they worked the requisite hours for each, and should be paid either a full- or half-day's pay, rather than an hourly rate based on the actual hours they worked.

Respondent counters this argument with two earlier decisions by this Grievance Board holding that W. Va. Code § 18A-4-8a is inapplicable to summer bus operator wages “because it merely indicates that 'a determination of full-time or part-time employment for salary purposes pertains to the term of a service employee's contracted regular employment, not summer school employment.'” Waybright v. Webster County Bd. of Educ., Docket No. 00-51-072 (Nov. 22, 2000), citing McMillin/Colvin v. Hancock County Bd. of Educ., Docket Nos. 93-15-366/467 (May 20, 1994).

Although Grievants' contracts characterize their employment as "Extracurricular Duty Assignments," the positions are plainly summer positions that fall within the rubric of W. Va. Code § 18-5-39. Grievants were serving in positions incident to summer school programs, and so they fall within the summer employment provisions of that statute. See Gibson v. Wayne County Bd. of Educ., Docket No. 98-50-374 (Dec. 3, 1998). In contrast, “extracurricular assignments” as defined in W.

Va. Code § 18A-4-16 for would be, for service personnel, all assignments except regular positions under W. Va. Code § 18A-4-8 or extra-duty assignments under W. Va. Code § 18A-4-8b. West Virginia Code § 18-5-39(f) gives summer service personnel the benefits of § 18A-4-8, and the duties are not of the irregular nature that would render them extra-duty assignments under § 18A-4-8b. It may be that a bus run would come up that is not contemplated by a summer bus operator's contract, for example, that falls outside the hours of the morning and afternoon runs or is for a field trip. In that case, it should be filled as a extra-curricular assignment or extra-duty assignment. Normal duties performed in the regular course of the employee's summer contract, however, are neither. Hence, personnel employed in regular summer positions are regularly-employed. This distinction seems to strengthen Respondent's argument, that McMillin *supra*, controls and that summer employees are not entitled to pay in excess of the actual hours they worked.

Grievants raise a valid point, however, that W. Va. Code § 18-5-39 has been amended since McMillin was decided. In 1996, the legislature added the language upon which Grievants rely, specifically:

> . . . The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed *and persons employed in those positions are entitled to all rights, privileges and benefits provided in sections [18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14] of this code: Provided, That those persons are not entitled to a minimum employment term of two hundred days for their summer position*.

(emphasis added) W. Va. Code § 18-5-39(f) (2000). The italicized portion was added, and Waybright, *supra*, decided in 2000 and Cole v. Putnam County Bd. of Educ., Docket No. 01-40-045 (March 5, 2001), did not consider these changes, but instead relied on theholding in the 1994 McMillin case. (See footnote 5) McMillin relied on language in W. Va. Code § 18A-4- 8a that has also been legislated out of existence since then. That case stated:

> Code §18A-4-8a's provision that "the minimum monthly pay for each employee whose employment is for a period of three and one-half hours a day shall be at least the amounts indicated in the 'state minimum pay scale grade'" is also not applicable to summer school employment. The three references to "employment term" or "full employment term" in the same paragraph of this portion of the statute clearly indicates that a determination of full-time or part-time employment for salary purposes pertains to the term of a service employee's contracted regular employment, not summer school employment, an entirely different matter.

The references to an employment term in that statute disappeared after its amendment in 1994, after the case was decided, so it would be folly to rely on the same analysis of the current version of the statute. Indeed, it may be that the language was removed from the statute as a result of McMillin. In any event, the present case must be decided under the plain meaning of the current statute, and not based on the interpretation of statutory language no longer in existence.

The new language is much simpler and is plain and unambiguous. It is plain that Grievants were summer employees, and therefore must be paid based on the salary schedule for regularly employed bus operators. This salary schedule is found in W. Va. Code § 18A-4-8a (reproduced above), and expressly requires that service personnel be paid a minium salary.

Under W. Va. Code § 18A-4-8a,

> [T]he minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the "state minimum pay scale pay grade II" and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the "state minimum pay scale pay grade II" set forth in this section. "

Thus, the measure of pay is not actual hours worked, but whether those hours amount to a full day or half-day. Logically, then, the monthly rates should be translated into daily or half-daily rates for employees who work less than a monthly employment term, rather than into hourly rates.

Accordingly, the amendment to W. Va. Code § 18-5-39(f) effectively supercedes the holding in Waybright, *supra*, and those cases descended from it. Henceforth, summer service personnel should be paid based on a daily rate or half-daily rate, according to their hours worked.

The legislature, by its amendment of W. Va. Code § 18-5-39(f), also attached certain benefits to summer positions that were not granted by the earlier versions of the statute. These are the benefits conferred by W. Va. Code §§ 18A-4-5b (county salary supplements), 18A-4-8 (various restrictions on employment and benefits), 18A-4-8a (minimum monthly salaries), 18A-4-10 (personal leave) and 18A-4-14 (duty-free lunch period). To be consistent with the foregoing paragraph, these benefits must also be pro- rated based on the workdays of the employee.

Since an employee's workday also determines whether the employee is a full-time or part-time summer employee, it must also be determined whether the benefits sought are applicable to a full-time or part-time employee. Respondent correctly points out, for instance, that W. Va. Code § 18A-4-

10 only confers personal leave benefits on full-time employees, defined for purposes of the salary schedule as those working more than three and one-half hours per day. Likewise, W. Va. Code § 18A-4-14 only confers a duty-free lunch period to those employees working more than three and one-half hours per day.

Grievants also rely on Ritchie County Board of Education Pupil Transportation Service Policy, § VI.A.1, to support their argument that summer bus operators must be paid on a daily rate. This Policy states: "The Ritchie County Board of Education will provide a bus or buses at a cost of fifty cents per mile for approved activities, and the respective schools using the bus will pay driver's salary for curricular or extracurricular trips at a rate established by state law." However, this policy establishes a duty as between the school using the bus and the Board of Education, and confers no benefit on the driver of the bus.

Grievants' final issue is that they should have been paid holiday pay for Independence Day, July 4, 2001. While the above holding does confer holiday pay for holidays falling within the employment term, each Grievant's contact expressly excluded this day from their employment terms. Grievants are therefore not entitled to pay for days falling outside the terms of their employment.

The following Conclusions of Law support the above discussion:

CONCLUSIONS OF LAW

1. Because their allegations are unrelated to a disciplinary action, Grievants bear the burden of proving their charges by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. “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 and Human Resources,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.

2. The holdings in McMillin/Colvin v. Hancock County Bd. of Educ., Docket Nos. 93-15-366/467 (May 20, 1994) and its progeny that a determination of full-time or part-time employment for salary purposes required by Code §18A-4-8, pertains to the term of a service employee's contracted regular employment, not to summer school employment, has been superceded by the 1996 amendment to W. Va. Code § 18-5-39(f).

3. Service personnel employed under contracts for regular summer positions W. Va. Code § 18-5-39(f) (2001) are not working in extracurricular or extra-duty assignments.

4. Service personnel employed in summer positions must be paid a daily or half- daily rate based on the salary scale contained in W. Va. Code § 18A-4-8a.

5. Service personnel employed in summer positions are entitled to the benefits conferred by W. Va. Code §§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14, prorated on a daily or half-daily basis.

6. July 4, 2001, was outside the term of Grievants' employment, and they are not entitled to holiday pay for that day.

For the foregoing reasons, this grievance is GRANTED IN PART and DENIED IN PART. Respondent is ordered to compensate Grievants an amount equal to the difference between their actual pay for their summer, 2001 employment and the amount they would have received had such pay been calculated in accordance with W. Va. Code § 18A-4-8a at the proper daily or half-daily rate. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie County. Any 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. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: January 15, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

At the Level IV hearing, the parties stipulated that this issue had been resolved, and need not be considered at this level.

Footnote: 2

The parties also stipulated that on page 33 of the Level II transcript, the reference to Richard Johnson should be to Richard Morrison.

Footnote: 3 *This acronym is undefined in the record.*

Footnote: 4 *Excluding July 4, which was also excluded from the Energy Express posting.*

Footnote: 5

It is not apparent from the Waybright decision that the effect of the amendments was argued, hence the decision was evidently reached based on a close similarity of facts. Cole stated that Grievant had presented no argument in support of a decision that McMillin did not apply.