WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOHNNY SARGENT,

Grievant,

v. **Docket No. 06-40-229**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Johnny Sargent ("Grievant"), employed by the Putnam County Board of Education ("PCBE") as a bus operator, filed a grievance on May 4, 2006, in which he alleged violations of *W. Va. Code* §§ 18A-4-16(6) and 18A-4-8(m) when his extra-duty contracts were amended. For relief, Grievant seeks reinstatement of the assignment he held during the 2005 - 2006 school year, back pay and benefits. Grievant's request that consideration at level one be waived was granted by PCBE. The grievance was denied following an evidentiary hearing at level two. Grievant bypassed consideration at level three, and filed a level four appeal on July 10, 2006. Grievant's representative, Susan E. Hubbard, a West Virginia Education Association consultant, and PCBE counsel, Gregory W. Bailey, Esq., of Bowles, Rice, McDavid, Graff & Love agreed to submit the grievance based on the level two record. Proposed findings of fact and conclusions of law were filed on behalf of PCBE on August 7, 2006. Grievant elected not to file additional proposals. The grievance became mature for decision on September 7, 2006. (See footnote 1) The following facts have been derived from a preponderance of the credible evidence admitted during the level two hearing.

Findings of Fact

1. Grievant has been employed by PCBE as a bus operator since October 1992.

2. Grievant currently holds two extra-duty assignments transporting students to the vocational center. He has held the first run since 1996, and the second run since 2000.

3. Prior to the 2004-2005 school year, PCBE bus operators were compensated at varying amounts for extra-duty assignments. Some bus operators, including Grievant, were awarded 200-day

contracts for the extra assignments, which included compensation for days the runs were not completed, such as school closings, or if the employee was sick. Other bus operators who were employed on an “as needed” basis were paid only for the days they actually completed the run.

4. In May 2004, PCBE took action to uniformly compensate bus operators for extra-duty assignments. Specifically, a rate of $10.00 per run of an hour or less, and $10.00 per hour for all runs in excess of one hour, was paid effective September 7, 2005.

5. As a result of PCBE's action, Grievant realized an increase in his hourly salary, which had previously been $7.20 per day for a flat rate of $144.00 per month.

6. During the 2005-2006 school year PCBE continued to employ four bus operators, including Grievant, under a 200-day extra-duty assignment. Although Grievant was not given a contract for the 2005-2006 school year, his salary was adjusted to reflect the new rates. 7. In March 2006, the 200-day bus operators were notified that their extra-duty runs were being eliminated, and would be re-established on an “as-needed” basis. On May 1, 2006, PCBE approved the recommendation following a hearing requested by Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); *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.

Grievant contends that he is entitled to the extra-duty assignments under the same terms and conditions which applied during the 2005-2006 school year, *i.e.,* with compensation for the runs whether they are needed or not on any given day. PCBE asserts that the changes were necessary to insure that all bus operators were being compensated uniformly for extra-duty assignments. Grievant points to two statutes which he believes are pivotal to the outcome of this case. First, *W. Va. Code* § 18A-4-16(6) which provides, in pertinent part:

An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an

extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination.

Second, is the so-called “non-relegation clause” of *W. Va. Code* § 18A-4-8(m), which provides, in pertinent part:

No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

PCBE does not dispute that Grievant's assignments did not change between the 2005-2006 and 2006-2007 school years, but asserts that the action was proper to insure compliance with *W. Va. Code* §18A-4-5b, which contains language providing that:

Uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county . . .

PCBE also argues that the change was required because a violation of the uniformity provision was held to constitute discrimination, as defined by *W. Va. Code* § 18- 29-2(m), in *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). In that case, Ms. White established that her position as a secretary employed under a 240-day employment term was substantially similar to those positions holding a 261-day contract, except she did not receive the additional benefit of a paid vacation. The West Virginia Supreme Court of Appeals found that the violation of the statutory uniformity provisions constituted discrimination.

Finally, PCBE also relies on a Decision issued by the State Superintendent of Schools on November 30, 1982, in the matter of *Fike v. Pritt.* In that case, the Preston County Board of Education reduced Ms. Fike's $46.00 monthly supplement as a custodianbut increased all service employees' supplement by $30.00, to equalize the supplement paid to all service personnel. Because there had been no real salary reduction, the Superintendent determined there had been no violation of *W. Va. Code* § 18A-4-8. PCBE has expressed valid concerns that employees be treated uniformly, and not in a discriminatory manner. However, in *Crock v. Harrison County Bd. of Educ.,*

211 W. Va. 40, 560 S.E.2d 515 (2002), a case substantially similar to the present matter, the West Virginia Supreme Court of Appeals held that the non-relegation clause prohibits a board of education from terminating an employee's contract and reissuing it with altered compensation. In that case, the board had attempted to reissue the grievants' contracts without the previously granted credit for prior experience which had been incorporated into their salaries. The Court noted that, since there were no changes in the employees' employment terms or the positions they held, taking this action merely to alter their salaries was clearly prohibited by the statute. Such is the case here. (See footnote 2)

PCBE does not deny that Grievant is currently performing the identical extra-duty assignments he has held for many years, but questions whether there is any change his in overall compensation. PCBE estimates that Grievant received at least a 38% salary increase due to the changes made in the salary schedule in 2005. Even withoutcompensation for the days he does not complete the runs, PCBE opines there has been no reduction in salary. Grievant has not identified any specific salary loss in terms of dollars.

PCBE's argument that Grievant has not suffered a reduction in salary is flawed. The increased compensation awarded in 2005 was not contingent upon a change in the terms of Grievant's assignments. During the 2005-2006 school year Grievant received the increased pay under the 200-day agreement, including those days he did not complete the run. Because the new contracts are for the same positions with a reduced salary, this reduction in salary comes squarely within the prohibited acts specified in the non-relegation clause, and PCBE is not permitted to alter Grievants' compensation for performing the identical assignments he performed during the previous school year, pursuant to the provisions of *W. Va. Code* § 18A-4-8(m). Grievant is entitled to the relief requested, *i.e.* compensation under the previous year's terms for performance of his extra-duty assignments. The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *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. Pursuant to the provisions of *W. Va. Code* § 18A-4-8(m), a board of education is prohibited

from terminating an employee's contract and reissuing the contractwith altered compensation terms, if the employee is serving in exactly the same position as the previous school year. *Crock v. Harrison County Bd. of Educ*., 211 W. Va. 40, 560 S.E.2d 515 (2002).

3. Grievant has proven by a preponderance of the evidence that PCBE acted in violation of the non-relegation clause of *W. Va. Code* § 18A-4-8(m), when it altered the compensation provisions of his extra-duty contracts.

Accordingly, this grievance is **GRANTED**, and PCBE ORDERED to reinstate the 200- day compensation held by Grievant prior to the 2006-2007 school year, with back pay and interest.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Putnam 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: SEPTEMBER 25, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.An effort was made to determine whether this grievance should be consolidated with a related grievance. However, receiving no response from other parties, this grievance was deemed mature for decision on this date.

Footnote: 2

[2]In Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994), the Court recognized an exception to the non-relegation clause exists when a board of education reissues contracts to employees with different terms at reduced salaries. The exception in Lucion was expressly based on the fact that the new contracts issued had reduced employment terms. Due to the change in employment terms, it was determined that the new positions were not the same as the positions previously held by the affected service personnel. The present case does not fall under this exception since there were no changes in the employment terms of either of Grievant's contracts.