WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

REX TONEY,

Grievant,

v.

Docket No. 2008-0533-LinEd

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rex Toney ("Grievant") filed this grievance on September 8, 2006, alleging that he was "[p]aid $10/hour for summer activity instead of 1/7 daily rate in violation of § 18-5-39 and 18A-4-8m" and for relief requested "[t]he difference in pay between 1/7 of daily rate per hour and $10/hour for the duration of the summer activity runs." Grievant's level three appeal, filed March 27, 2008, slightly altered the Statement of Grievance alleging that he was "[p]aid $10/hour for evening activity runs instead of 1/7 daily rate in violation of § 18A- 4-8m." As relief, Grievant is requesting "[t]he difference in pay between 1/7 of daily rate per hour and $10/hour for the duration of the evening activity runs."

On September 21, 2007, a transfer form was filed regarding the grievance requesting it be transferred to the new procedure of the Public Employees Grievance Procedure as set out at W. Va. Code §§ 6C-2-1, *et seq*. (See footnote 1) In accordance with that procedure, a level one conference was held with Superintendent David Roach. Superintendent Roach denied the grievance by decision issued on November 16, 2007. Grievant appealed this ruling on November 20, 2007, and a level two mediation sessionwas held on March 19, 2008. Level two was unsuccessful. A level three hearing was conducted before the undersigned Administrative Law Judge on August 13, 2008, at the Board's Charleston Office. Grievant appeared in person and by his counsel, William McGinley, West Virginia

Education Association. The Lincoln County Board of Education ("Respondent") appeared by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love LLP. The matter became mature for consideration on September 15, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

At the end of the 2005-2006 school year, Grievant was employed to drive students on a supplemental bus run at a rate of 1/7th his daily rate of pay. It is undisputed that this position should have been posted. This practice continued for a limited time from June 2006 through early September 2006. However, the record is unclear how many supplemental bus runs Grievant undertook during that time. In September 2006, the Respondent posted this position with the rate of pay at ten dollars per hour. Grievant bid for and was awarded this position under the terms of the posting. Grievant asserts that the change in the rate of pay violates the non-relegation clause of W. Va. Code § 18A-4-8(m). The error in paying Grievant at a rate of 1/7th his daily rate was corrected to be consistent with the September 5, 2006, posting under which other bus operators were awarded the supplemental bus runs. This action by Respondent did not violate the non-relegation clause. Grievant did not meet his burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle him to continue to receive a rate of pay granted in error. Following a thorough review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed by the Respondent as a school bus operator, and has been in that position for more than twenty years.

2. At the end of the 2005-2006 school year, due to the location of the new high school, the Respondent determined there was a need for bus runs to provide transportation for students participating in extracurricular activities and co-curricular activities.

3. As a result, two new bus runs were created, one from and to the Harts community, and one to and from the Duvall community.

4. Grievant was erroneously offered the position for the supplemental run from Hamlin to the Harts Creek area. Grievant was informed by Transportation Director Dana Smith that, since Grievant was the most senior bus operator, there was no need to post the position. Grievant received payment equal to 1/7th of his daily rate.

5. On September 5, 2006, the Respondent posted this position titled as “Supplemental Bus Operator” with the salary notation “$10.00 per hour not to exceed two hours per day as scheduled by the Lincoln County High Administration . . .” The posting further explained that the purpose of the run was “[t]o transport students participating in extracurricular activities and co-curricular activities” leaving “the high school at approximately 6:00 p.m.” Level three hearing, Grievant's Exhibit 5.

6. When Grievant observed the posting, and became aware of the posted rate of $10.00 per hour, his representative requested an informal conference by letter datedSeptember 8, 2006, to discuss this rate of pay. Level three hearing, Respondent's Exhibit 1. As noted above, the instant grievance was filed on September 8, 2006, under the old grievance procedure.

7. When Assistant Superintendent Jeff Huffman learned that Grievant was being paid an amount equal to 1/7th of his daily rate early in September 2006, Mr. Huffman notified the finance officer to correct the mistake and pay Grievant $10 per hour. Thereafter, Grievant was paid $10 for the supplemental bus operator's duties.

8. After the appropriate posting, Grievant applied for and was awarded one of the supplemental bus operator's position by the Board of Education's action on September 18, 2006.

9. A second bus operator, Ronnie Banks, was hired at the same time for the same position, only for the Duvall area, and was paid at the $10 per hour rate. Level three hearing, Respondent's Exhibit 2.

10. The informal conference was held on January 23, 2007, and a discussion was had with Grievant regarding the rate of pay made in connection with the position. The conference was requested pursuant to the former grievance procedure found in W. Va. Code §§ 18-29-1, *et seq*. The content of this conference was not reduced to writing.

11. Subsequent to the conference, Mr. Huffman recalled meeting with Grievant to discuss other issues, but he did not engage in negotiations with Grievant regarding the rate of pay for the supplemental bus run.

12. On May 31, 2007, and June 16, 2007, Grievant's representative mailed a correspondence to the known mailing address of Mr. Huffman stating that no decision hadbeen issued in the matter. Grievant requested Mr. Huffman render a written decision so that the grievance could proceed to the next level.

13. By correspondence dated September 21, 2007, Grievant's representative indicated he was

forwarding a level one grievance and transfer form intending to transfer the matter from the old grievance procedure to the new procedure. Grievant also requested a level one conference in this form.

14. The level one grievance form and transfer form relating to the $10 per hour pay for the activity run was filed on September 21, 2007.

15. One bus operator, Lucian Isaacs, is paid at the rate of 1/7th his daily rate. Mr. Isaacs, aside from his regular bus operator's duties, is also employed to train school bus operators during the school year and summer sessions.

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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). "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 & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993). (See footnote 2) Respondent argues that the grievance is untimely pursuant to W. Va. Code § 18-29- 4, as the informal conference was held on January 23, 2007, and the level one grievance was not filed until September 21, 2007, over seven months later. Further, Respondent asserts that even with a finding that Grievant's filing was done timely, Grievant's claim should fail in that he did not meet his burden of proof. Grievant relies exclusively on W. Va. Code § 18A-4-8(m), in asserting that the Respondent was prohibited from changing Grievant's rate of pay for the supplemental bus run.

Respondent asserts under the applicable legislation, W. Va. Code § 18-29-4(a)(3), within 10 days of the response from the immediate supervisor following the informal conference, any written grievance is to be filed with that supervisor. The response, if it even exists in this grievance, following the informal conference is ambiguous at best. Mr. Huffman conceded at level three that it is his normal procedure to issue a written decision after the informal conference. Nevertheless, no response, oral or written, was made to the various written requests of Grievant that Mr. Huffman communicate a decision that the grievance had been granted or denied.

The undersigned tends to agree with Grievant that, in the absence of a response from the

informal conference, his request for a level one conference on September 21, 2007, was in compliance with the statute that was applicable at that time. (See footnote 3) AssistantSuperintendent Huffman either failed to render a decision, or failed to respond to Grievant's request to clarify his position, after the informal conference. Thereafter, Grievant exercised his right to appeal the grievance to the next level. Given the somewhat unique circumstances of this grievance, the undersigned finds that Respondent has failed to prove the timeliness defense by a preponderance of the evidence. (See footnote 4)

Turning to the merits, Grievant asserts a violation of what is referred to as the non- relegation clause. W. Va. Code § 18A-4-8(m) provides as follows:

> Without his or her written consent, a service person may not be:
>
> (1) Reclassified by class title; or
>
> (2) 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 for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

In addition, Grievant cites as controlling the West Virginia Supreme Court of Appeals decision in *Crock v. Harrison County Board of Education*, 560 S.E.2d 515, 211 W. Va. 40 (2002), and this Board's decision in *Sargent v. Putnam County Bd. of Educ.*, Docket No. 06-40-229 (Sept. 25, 2006). (See footnote 5) In a *per curiam* opinion, the West Virginia Supreme Court of Appeals found in *Crock*, *supra.*, that the “non-relegation clause” precluded a county board of education from issuing a new contract for a school service employee, where the only change in the contract was the removal of the experience credit, for experience earned prior to the employee's employment with the county board of education, and which resulted in a salary reduction. *Crock*, *supra.* This opinion contains no syllabus points which are applicable here, but it reversed a Grievance Board decision which had found that “the termination of Grievants' contracts, and their replacement with modified contracts without prior experience credit, did not violate any law, policy, rule, regulation, or written agreement.” *Crock and Washingtion v. Harrison County Bd. of Educ.*, Docket No. 99-17-431 (Feb. 10, 2000); *aff'd*

Cir. Ct. of Harrison County, Appeal No. 00-C-154-1 (Oct. 17, 2000). (See footnote 6)

In this case, Grievant seeks to raise the non-relegation clause in claiming his 1/7th daily rate of pay. It is undisputed that Grievant proved that he was employed in a supplemental activity run from June 2006 through September 2006. However, the record is unclear how many times Grievant made this supplemental run at that rate of pay. Only one exhibit reflecting a voucher for one run at the 1/7th daily rate of pay was entered into evidence. Nevertheless, Grievant was apparently paid, for a limited period of time, at the rate of 1/7th of his daily rate of pay per hour for that run. In September, the Respondent changed the rate of pay for the same supplemental activity bus run to $10 per hour for theremainder of the school year. Grievant asserts the reduction in the rate of pay from one school year to the next for exactly the same job violated Grievant's rights pursuant to W. Va. Code § 18A-4-8(m). The undersigned disagrees.

The cases cited by Grievant, as well as other cases decided by this Board relating to the non-relegation clause, frame the non-relegation clause in terms of a factual analysis involving a change in terms of employment for a current fiscal year, and an alteration of the terms of a contract for the subsequent year resulting in a compensation change. (See footnote 7) In fact, most of the Board's cases involve a relegation of a condition of employment that has existed not only for a single year, but existed over the course of numerous years. Such is not the case in the instant grievance.

Grievant's rate of pay was altered because the assistant superintendent recognized the compensation was in error, and corrected the mistake immediately upon becoming aware of the situation. When Assistant Superintendent Huffman learned that Grievant was being paid an amount equal to 1/7th of his daily rate in early September 2006, Mr. Huffman notified the finance officer to correct the mistake and pay Grievant $10 per hour as posted. As distinguished from the cases cited in support of a violation of the non-relegation clause, this particular case involved a short span of time during which Grievant was paid in error. (See footnote 8) Furthermore, this was a position which was properly posted on or about September 5,2006. It was error for Transportation Director Dana Smith to offer this same position to Grievant in June 2006 prior to the appropriate posting. Thus, Grievant's rate of pay prior to the posting of the position was altered to correct the error made by the transportation department. It did not result in a violation of the non-relegation clause. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000);

Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997).

The undersigned finds that the Respondent's action in correcting any error in Grievant's rate of pay was appropriate in this case. The error in paying Grievant at a rate of 1/7th his daily rate was corrected to be consistent with the September 5, 2006, posting under which other bus operators were awarded the supplemental bus runs. Accordingly, Grievant did not meet his burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle him to continue to receive a rate of pay granted in error.

The following conclusions of law support the Decision reached.

Conclusions of law

1. 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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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).

2. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

3. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

4. Assistant Superintendent Huffman either failed to render a decision, or failed to respond to Grievant's request to clarify his position, after the informal conference. Thereafter, Grievant exercised his right to appeal the grievance to the next level. Given the somewhat unique circumstances of this grievance, the undersigned finds that Respondent has failed to prove the timeliness defense by a preponderance of the evidence.

5. Grievant did not meet his burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle him to continue to receive a rate of pay awarded in error.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (*See* Footnote 2*, supra)*. Neither the West

Virginia Public 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: October 31, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

This transfer only applies to the procedure of the matter, the substantive law in effect at the time of filing the grievance continues to control the outcome of this matter. (See Footnote 2, infra). This is not contested by the parties, as evidenced by their respective proposals which continue to reference the old statutory provisions.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

. . . if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level . . . W. Va. Code § 18-29-4(a)(3).

Footnote: 4

The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

Footnote: 5

Grievant asserted a violation of W. Va. Code § 18-5-39 in his initial Statement of Grievance. However, no evidence was offered at level three relating to that provision, and it was not addressed in Grievant's proposals. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. Church v. McDowell County Bd. of Educ., Docket No. 33- 87-214 (Nov. 30, 1987).

Footnote: 6

Grievant cites to Sargent, supra, as well, in support of his argument that the Respondent violated the non-relegation clause. Administrative Law Judge Sue Keller ruling that a violation of the non-relegation clause occurred when Respondent eliminated Grievant's extra-duty contracts, and re-issued them with an amended compensation.

Footnote: 7

See Bessie, et al., v. Putnam County Bd. of Educ., Docket No. 06-40-245 (Feb. 28, 2007); Jackson v. Wayne County Bd. of Educ., 00-50-040 (Apr. 21, 2000).

Footnote: 8

The limited record of this case only establishes one payment at the 1/7th daily rate of pay. Level three, Grievant's Exhibit 4. In cases such as this, "when relief sought by a grievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Jamison v. Monongalia County Bd. of Educ., Docket No. 05-30-338 (Jan. 20, 2006).