fWEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WAYNE SALMONS and KEITH COOK,
Grievants,

v. **Docket No. 2012-0223-CONS**

LINCOLN COUNTY BOARD of EDUCATION,
Respondent.

DECISION

Grievant, Wayne Salmons, and Grievant, Keith Cook, are both employed by the Respondent, Lincoln County Board of Education ("Board") as regular full-time Bus Operators. Both Grievants also worked a variety of extra-duty assignments during the summer in 2011. Mr. Salmons and Mr. Cook filed a joint grievance form on July 15, 2011, alleging:

> Not adding all jobs worked to get our correct daily rate. Past practice's they have combined other jobs to get correct daily rate.

As relief at level one, Grievants sought, "For them to combine all jobs worked to get correct daily rate." A level one conference was held on August 8, 2011. The grievance was denied in a level one decision dated August 29, 2011.

Grievants filed a level two appeal dated September 7, 2011, alleging:

> On July 1, 2011, Respondents began a new method of calculating the extra-duty assignment rate of pay for bus operators without notice and opportunity for hearing or consent of the employees. Grievants allege a violation of W. VA. CODE §§ 18A-4-8a, 18A-2-6 18A-4-8(m) &18A-2-12a.

As relief at level two, Grievants sought, "Resumption of the previous method of calculating extra-duty assignment pay for bus operators and compensation for lost wages with interest."

A level two mediation was held on November 28, 2011. Grievants filed an appeal to level three dated December 6, 2011, which continued to allege that Respondent was improperly calculating extra-duty assignment rate of pay for the Grievants. In the appeal, Grievants alleged the Board's action violated W. VA. CODE §§ 18A-4-8b and 18A-4-8g. Grievants continued to, "seek compensation for lost wages."

Respondent filed a Motion to Dismiss dated April 25, 2012, complaining that the statement of grievance had been modified at each level and arguing that the grievance statement failed to claim "an injury in fact, economic or otherwise" and that the relief sought was so speculative as to amount to a request for an advisory opinion. Grievants responded to the Motion to Dismiss on May 3, 2012. A hearing was held regarding the Motion to Dismiss on May 4, 2012, in the Charleston office of the West Virginia Public Employees Grievance Board. Grievants were represented by John E. Roush, Esquire, and Respondents were represented by Rebecca M. Tinder, Esquire. After hearing the arguments of the parties, the undersigned ruled that the grievance statement was sufficient to raise an adequate claim for relief and Ordered the level three hearing, which was scheduled for May 10, 2012, continued to give the parties additional opportunity for discovery related to the specifics of the Grievants' claims. A written Order was entered on May 11, 2012, reflecting that ruling. In response to discovery, Grievants provided documents that clarified the specific assignments for which they felt they were underpaid, the dates they worked those assignments and the amounts they felt they were due.

A level three hearing was held on September 6, 2012, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievants appeared at the

hearing and were represented by John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by Rebecca M. Tinder, Esquire Bowles Rice McDavid Graf & Love, LLP. The parties agreed to submit post hearing Proposed Findings of Fact and Conclusions of Law, both of which were received by the Grievance Board on October 10, 2012. This matter became mature for decision on that date.

Synopsis

Grievants alleged that they were entitled to be paid one seventh of their hourly rate of pay for extra-duty assignments they performed for the Respondent in the summer of 2011. They believed that their hourly rate should be calculated by adding their pay for their regular job and any extra jobs they were performing before the pay was divided by seven. Respondent argued that Grievants' regular pay should be calculated by dividing only Grievants' regular bus run salaries by seven. The plain wording of the posting for the positions required that the employees be paid their regular hourly rate, not their "daily total salary" as required for extra-duty assignments.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievants, Wayne Salmons and Keith Cook, are employed by Respondent, Lincoln County Board of Education, as regular full-time Bus Operators.

2. Both Grievants were also classified and worked as Groundskeepers[1] and Driver Trainers during the summer of 2011. Both Grievants were paid for working these

[1] The statutory classification title for this position is "Groundsman." W.VA. CODE § 18A-4-8(i)(46).

two additional duties from June 31, 2011, through August 24, 2011. Respondent's Exhibits 3 and 4.[2]

3. On May 19, 2011,[3] the Board posted vacancies for five "Critical Skills Bus Operators"[4] positions, to work from June 21, 2011, through July 27, 2011. The successful applicants would be paid their "regular hourly rate." They would not receive sick leave or paid holidays and would only be paid for the actual days they worked. The bus runs were performed Monday through Thursday. The trip to the school began at 8:30 a.m. and the students were picked up to leave the school at 11:30 a.m. Grievant's Exhibit 6, Job Vacancy Bulletin 2011-S1. The Respondent characterized the Critical Skills runs as extracurricular assignments.

4. During the instructional term of the school year, Respondent calculates the Bus Operators' regular hourly rate[5] by adding their daily rate of pay for their regular bus runs, plus the daily rate of pay for any extra runs the Operators make that day, and dividing by seven to get the hourly rate. Grievants' Exhibit 2.

5. To get the "regular hourly rate" for the Critical Skills" assignments in the summer of 2011, Respondent merely divided the Grievants' Bus Operators' daily rate for their regular bus runs by seven.[6] Respondent did not add the daily rate Grievants

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[2] These exhibits are tables developed by Board's finance office setting out the jobs each grievant performed during the summer of 2011, the days they each worked those jobs and the amount of pay each Grievant received for those jobs during that period.

[3] The posting period ran from May 23, 2011 through May 27, 2011.

[4] "Critical Skills is a voluntary summer program for students in need of enhancement of reading and math skills. It was offered in five general areas of the county. The posted positions were for Bus Operators to provide transportation for students who chose to participate in that program in each geographic area.

[5] Sometimes referred to as the "regular daily rate."

[6] Respondent originally divided the daily rate of pay by eight hours until Grievants brought this matter to the Superintendent's attention. The superintendent directed the Board's finance office to divide the daily rate by seven to give the employee the benefit of any doubt in how the calculation should be done. Level three testimony.

were also receiving as Groundskeepers and Driver Trainers when calculating their regular hourly rate for the Critical Skills runs.

6. Every day Grievants drove the Critical Skills run in June 2011, were in the 2010-2011 school year and Grievants' daily rate of pay for their regular bus runs were based upon their salaries for that year. Every day Grievants drove the Critical Skills run in July 2011, were in the 2011-2012 school year and their daily rates of pay for their regular runs reflected the increase they received for another year of service pursuant to the salary schedule.

7. Grievant Salmons' daily rate for his regular bus run in June 2011 was $105.95. His daily rate for his regular bus run in July 2011 was $112.55. Grievant's Exhibit 2.

8. Grievant Cook's daily rate for his regular run in June 2011 was $108.65. His daily rate for his regular bus run in July 2011 was $115.22. Grievant's Exhibit 1.

9. Grievant Salmons and Grievant Cook were paid $15.00 per hour for their work as Driver Trainers. Respondent's Exhibits 3 & 4.

10. The hourly rate for Groundskeeper work for Grievant Salmons in June 2011 was $12.66. In July that rate went up to $13.48 per hour. The hourly rate for Groundskeeper work for Grievant Cook in June 2011 was $13.00. In July that rate went up to $13.82 per hour. Respondent's Exhibits 3 & 4.

Discussion

Respondent asserts that Grievants did not reveal the actual jobs they believed they were improperly paid for, until their counsel clarified that it was the Critical Skills runs in their discovery response dated August 14, 2012, in which he wrote:

> The current grievance may be narrowed to the time period of June 21, 2011 through July 27, 2011. During that time Grievants' worked in a summer program (Critical Skills) as bus operators and were paid on an hourly basis as specified in the posting. Grievants contend that they were paid at an incorrect hourly rate.[7]

Respondent argues that since this is the first time it was made aware of a claim related to the Critical Skills run which took place a year earlier, the grievances should be dismissed as untimely. This issue goes hand-in-hand with Respondent's first motion to dismiss the grievances because they did not, on their initial grievance forms, specifically raise the specific jobs for which the Grievants believed they were improperly paid. These issues were dealt with in the hearing that took place on May 4, 2012. In their original grievance statements, both Grievants stated that Respondent was "[n]ot adding all jobs worked to get our correct daily rate. Past practice's they have combined other jobs to get correct daily rate." This Grievance statement was further clarified on the level two forms, but still did not specifically specify the Critical Skills run.[8]

When the employer asserts an affirmative defense, such as untimeliness, it must be established by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Mills/Mills v. Wayne County Bd. of Educ*., Docket No. 06-50-415 (March 5, 2007). As pointed out in the May 14, 2012 hearing, the West Virginia Supreme Court of Appeals has consistently held that the Legislative intent that the grievance procedures be a simple, expeditious and fair process for resolving problems. The procedure must be given a flexible interpretation so that it does not become a "procedural quagmire where the merits of the case are

[7] *See,* Grievants' "Response to Request for Clarification of the Scope of the Grievance."
[8] See page one *supra* for the full level two grievance statement.

forgotten." *Hale v. Mingo County Bd. of Educ*., 199 W. Va. 387, 390, 484 S.E.2d 640 (1997); *Vest v. Board of Educ. of County of Nicholas*, 193 W. Va. 222, 224, 455 S.E.2d 781, 783 (1995); *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 730, 391 S.E.2d 739, 743 (1990); *Duruttya v. Mingo County Board of Education*, 181 W. Va. 203, 205, 382 S.E.2d 40, 42 (1989). With regard to timeliness, Justice Starcher specifically stated:

> *Spahr* and *Duryutta, supra* teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

Hale, supra, 199 W. Va. 387, 393.

Grievants' original grievance statement put Respondent on notice that Grievant's were contesting their rate of pay for their summer jobs. Respondent was well aware of what jobs Grievants were working in the summer of 2011. The undersigned facilitated discovery between the parties to insure that Respondent knew the specifics of Grievants general claims. That is the purpose of discovery. Given the Supreme Court's consistent and repeated direction regarding the nature of the grievance process, Respondent's claim that the grievances were untimely, was clearly without merit.

With regard to the merits of the grievances, since these grievances do not involve a disciplinary matter, Grievants bear the burden of proving the grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

An important factor in determining how the Bus Operators should be paid for the Critical Skills assignment is whether it is properly characterized as an extracurricular assignment or an extra-duty assignment. W. VA. CODE § 18A-4-16 states:

> 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*: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

(Emphasis added).

The pay for extracurricular assignments is determined by an agreement between the Superintendent and the employee and approved by the board of education. W. VA. CODE § 18A-4-16 (2) & (3).[9]

Extra-duty assignments are defined in W. VA. CODE § 18A-4-8b (f) (1) as follows:

> For the purpose of this section, "extra-duty assignment" means *an irregular job that occurs periodically or occasionally* such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

Id. (Emphasis added).

> The minimum hourly rate of pay for extra duty assignments as defined in section eight-b [§ 18A-4-8b] of this article 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.

W. VA. CODE § 18A-4-8a (j) (Emphasis added).

[9] In practice, a county board posts the extracurricular assignments with the pay included and employees apply for the assignments if they are interested.

The Respondent's Superintendent characterized the Critical Skills assignments as extracurricular and that is correct based upon the definition found in Code. The assignments occur on a regularly scheduled basis: four days per week beginning at 8:30 a.m., which fits the definition for extracurricular set out in W. VA. CODE § 18A-4-16. They also occurred during the summer, outside the Bus Operators' regular work schedule. These assignments were clearly not "irregular job[s] that occur[red] periodically or occasionally" as defined for extra-duty assignments in W. VA. CODE § 18A-4-8b. Therefore, the pay for these assignments was the amount set out in the job posting for the positions.

The salary portion of the job posting stated that the Bus Operators would be paid their "Regular hourly rate."[10] Respondent's position is that the regular hourly rate refers to Grievants' hourly pay for their regular bus runs. Grievants take a more expansive view. They believe that the regular hourly rate equates to "one seventh of the employee's daily total salary" which must be paid for extra-duty runs during the regular employment term. The Grievance Board has previously held that the term "daily total salary" requires a board to total all pay an employee receives in a day, including the pay for his regular assignment and any extra assignments he may be performing on that day and then divide that figure by seven to get the hourly rate the employee must be paid for an extra-duty assignment. *See Terek v. Ohio County Bd. of Educ.,* Docket No. 91-35-365 (Mar. 4, 1992); *Miller et al. v. Lincoln County Bd. of Educ.,* Docket No. 93-22-082 (Sept. 2, 1993).

Clearly, if the Critical Skills runs were extra-duty assignments Grievants would prevail. But these assignments are extracurricular assignments. There is a critical

[10] They would not receive sick leave or paid holidays and would only be paid for the actual days they worked.

difference in the wording between the pay for extra-duty assignments ("total daily rate") and the "regular hourly rate" listed in the posting. The posting refers only to the rate paid to the Bus Operator for his regular run, not the "*total* daily rate" set out in W. VA. CODE § 18A-4-8b for extra-duty assignments. It is axiomatic that, if construction or interpretation is necessary, school personnel regulations and laws are to be strictly construed in favor of the employee. *Syllabus Point 1, Morgan v. Pizzino,* 163 W. Va. 454, 256 S.E.2d 592 (1979). In this instance, the posting language clearly refers to the employee's regular pay for his regular job and no interpretation is necessary. "Where the language in question is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Fraley v. Civil Serv. Comm'n,* 177 W. Va. 729; 356 S.E.2d 483 (1987). Grievants were paid their hourly rate for their regular bus runs when performing the extracurricular Critical Skills assignments. Accordingly, the grievances are DENIED.

Conclusions of Law

1. When the employer asserts an affirmative defense, such as untimeliness, it must be established by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Mills/Mills v. Wayne County Bd. of Educ.*, Docket No. 06-50-415 (March 5, 2007).

2. Respondent did not prove by a preponderance of the evidence that the grievances should be dismissed for failure to state a claim or that the grievances were not timely filed.

3. The Critical Skills assignments occurred on a regularly scheduled basis; four days per week beginning at 8:30 a.m. Also, they occurred during the summer,

outside the Bus Operators' regular work schedule. Consequently, they fit the definition for extracurricular set out in W. VA. CODE § 18A-4-16. These assignments were clearly not "irregular job[s] that occur[red] periodically or occasionally" and were for extra-duty assignments defined in W. VA. CODE § 18A-4-8b. Therefore, the pay for these assignments was the amount set out in the job posting for the positions.

4. If construction or interpretation is necessary, school personnel regulations and laws are to be strictly construed in favor of the employee. *Syllabus Point 1, Morgan v. Pizzino,* 163 W. Va. 454, 256 S.E.2d 592 (1979). "Where the language in question is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Fraley v. Civil Serv. Comm'n,* 177 W. Va. 729; 356 S.E.2d 483 (1987).

5. The posting refers only to the rate paid to the Bus Operator for his regular run, not the "*total* daily rate" set out in W. VA. CODE § 18A-4-8b for extra-duty assignments. The language of the posting is clear and Grievants were properly paid the hourly rate of their regular bus runs as set out in the position posting.

Accordingly, the grievances are DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: MARCH 8, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE