HOWARD CONNER, .

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Grievant, .

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v. . Docket No. 93-01-422

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BARBOUR COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

Grievant, Howard Conner, is a Bus Operator for the Barbour County Board of Education (hereinafter Board). He filed the instant complaint on June 4, 1993, alleging that he was improperly denied the opportunity to make an extra-duty bus run on June 4, 1993, which he was entitled to on the basis of his seniority. His claim was denied at the lower levels and an appeal to level four was perfected on October 6, 1993. Mr. Conner did not attend the level four hearing held on November 12, 1993, but was represented by his wife, Karen Sue Conner, also a Bus Operator employed by the Board. Ms. Conner not only set forth Grievant's legal argument but also testified as to evidence which she contended she had personal knowledge. The substance of Grievant's argument is extremelydifficult to discern in relation to the facts as presented. Most of the exhibits submitted on behalf of Grievant were actually written notes or summaries of other documents prepared by Ms. Conner to support Grievant's interpretation of the facts. The undersigned has attempted, with some difficulty, to deduce the following facts from the records developed at both the level three and four hearings.

Findings of Fact

1. At all times pertinent hereto, Grievant has been a Bus Operator with the Board for approximately seventeen years.

2. Grievant drives his normal a.m. and p.m. bus routes in and around the county designated "Phillipi area."

3. At all times pertinent hereto, Mr. Edward Larry was the Transportation Director for the Board.

4. The practice in Barbour County has been that Bus Operators are offered the ability to make extra-duty runs on a rotating basis according to area seniority. Whenever a Bus Operator is not able to make an extra-duty run for which he/she is in line, that operator is given another "make-up" run at the beginning of the next week. If a Bus Operator declines to make an extra-duty run offered to them then he/she is not given a "make-up" run.

5. On or about June 2, 1993, Mr. Larry offered Grievant the ability to perform a "make-up" extra-duty bus run to Pittsburgh, Pennsylvania. The run was originally scheduled to return atapproximately 8:30 p.m. Grievant accepted this opportunity to make this run.

6. Due to Grievant's religious belief, he does not work after the sun goes down on Fridays, if at all possible. After Grievant had accepted the run to Pittsburgh, the organization which was being transprted requested notified Mr. Larry that the trip might last longer than originally expected. Based upon this information, Grievant declined the opportunity to make the run.

7. Peggy Moss, another Bus Driver for the Board, actually drove the Pittsburgh run on June 4, 1993. Ms. Moss had approximately seven years of experience at the time in question.

8. Ms. Moss was offered the Pittsburgh run because she was owed the opportunity to perform a "make-up" run pursuant to Mr. Larry's practice of assigning runs.

9. There were two more extra-duty runs subsequently assigned within the "Phillipi area" during the 1992-1993 school year and Grievant was not given the opportunity to perform either of these runs because he had turned down the Pittsburgh run.

10. The two operators who were assigned these runs were given such because it was believed that they were "owed" the opportunity to have "make-up" runs. (See footnote 1)

11. At the beginning of the 1992-1993 school year, the Bus Operators for the Board voted to have extra-duty runs assigned onthe rotating basis of seniority according to geographic assignment

area.

Discussion

West Virginia Code §18A-4-8b, states in pertinent part, as follows:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting such personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle shall then be repeated.

The undersigned believes that Grievant's legal argument rests upon the theory that he was entitled to one of the last two runs made during the school year on the basis that he had more seniority than either of the two drivers who made those runs. The Board contends, supported by the testimony of Mr. Larry, that Grievant was not entitled to one of the two runs because he had previously turned down his "make-up" run; therefore, he was not entitled to one of the two remaining replacement "make-up" runs because the other drivers were due runs before him.

Grievant's case must be proven by a preponderance of the evidence. Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989). In other words, Grievant must present evidence to establish that under the applicable law, policy or practice, it was more likely than not that he was entitled to be offered the opportunity to drive either of the last two extra-duty bus runsmade at the end of the 1992-1993 school year. Based upon the evidence of record, Grievant has failed in meeting his burden.

The documents submitted into evidence do not clearly establish the order in which the make-up runs in question were to be assigned. Further, Grievant has not established that either of the two drivers who accepted the two extra-duty runs were not somehow entitled to be offered those runs ahead of him. Grievant may very well have been entitled to a make-up run on the basis that he could not make the Pittsburgh trip, but it has not been established pursuant to Code §18A-4-8b that he was entitled to one of the two runs in question over the drivers who were said to have been entitled to the runs. Finally, Grievant has not established that Mr. Larry's method of assigning extra-duty runs was arbitrary or capricious or violative of Code §18A-4-8b. See, O'Conner v. Marion Co. Bd. of Educ., DOcket No. 24-86-202-2 (Mar. 24, 1987).

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusion of law.

Conclusion of Law

Grievant has failed to establish factually that he was entitled to one of the extra-duty assignments at issue in this case or that the Board had violated W.Va. Code §18A-4-8b in its practice of making extra-duty assignments to its Bus Operators.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour 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.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 4, 1994

Footnote: 1 There is some reference in the record to the fact that one of these runs may have been assigned as a result of a settlement of an earlier grievance filed concerning the issuance of extra-duty assignments. If this is actually the case, then Grievant could not claim any legal entitlement to that particular run.