LARRY EASTHAM,

Grievant,

v. **Docket No. 95-06-191**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Larry Eastham, argues the Cabell County Board of Education ("CCBOE") violated W. Va. Code §§18A-4-8b and 18A-4-16 in the awarding of two extracurricular bus runs. Grievant stated he was the most senior bidder on these runs and should have been able to keep both as they were on different days of the week. Grievant was asked to choose which run he wanted. When he filed the grievance, Grievant asked to be granted both runs and wages and benefits due. Shortly after filing the grievance, Grievant received a five day a week run, and thus sought as relief, $60.00, or payment for the four days he was available to do the additional run and was not allowed to do so.

This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was conducted on July 12, 1995, and this appeal became mature for decision on that date.

The material facts of this grievance are not in dispute and are stated below.

Findings of Fact

1. Grievant has been a bus operator for CCBOE for seventeen years.

2. On August 26, 1994, CCBOE posted an "extracurricular assignment" for a Talented and Gifted ("TAG") run during the school day between the routine a.m. and p.m. runs. This posting stated: This run is designed to serve the educational needs of special students in the county elementary schools. Students are transported to and from learning center located at Hite Saunders Elem. School for a session 9a.m.-1p.m. Students currently come from Cox Landing, Guyandotte and Highlawn; however, this is subject to change. Schools may be added or deleted at anytime. The students vary from day to day causing the run to vary daily. This run pays $15.00 per day for each day the

assignment is performed.

Grievant bid on this job and received it. At the time Grievant started this run it was scheduled for Thursdays.

3. On September 13, 1994, CCBOE posted another TAG run. This posting stated:

This run is designed to serve the educational needs of special students in the county elementary schools. Students are transported to and from the learning center located at Pea Ridge Elementary School for a session 9a.m.-1p.m. Students currently come from Altizer Elementary; however this is subject to change. Schools may be added or deleted at anytime. The students vary from day to day causing the run to vary daily. This run pays $15.00 per day for each day the assignment is performed.

This run was also scheduled during the school day and was initially scheduled for Mondays only. Grievant bid on this position and was the most senior applicant willing to take the position.

4. On approximately October 3, 1994, Ms. Patty Pauley, Superintendent of School Transportation, informed Grievant thesecond posted run was now two days a week, on Mondays and Fridays. She also told Grievant he would have to choose between the two positions.

5. Past practice of CCBOE has been to limit bus operators to one extra run between school hours. The rationale for this practice is to prevent conflicts and to allow more employees to receive additional monies.

6. On August 25, 1994, CCBOE's bus operators voted on multiple options including the following:

OPTION II

All Extended runs during the day and the PM Extended runs will be awarded strictly on a seniority basis. (This would mean that a driver with the most seniority could get as many as he could qualify for and could work in his schedule. One person could hold down several extra duties at a time, time permitting. This would eliminate [sic] rotating, which would limit the number of persons holding extra duty extended runs.

This vote was taken pursuant to W. Va. Code §18A-4-8b, which allows bus operators to choose an alternative to rotating extra-duty assignments by seniority.

7. Grievant was present at this meeting and waited to learn the outcome of the vote. The bus operators rejected this option by a vote of 12 to 78.

8. The issue in this option arose again at the end of the school year and was again rejected by CCBOE bus operators.

9. Prior to the August 25, 1994 vote, CCBOE's practice of allowing drivers only one extra mid-day position had not been adopted as a written policy, but had been followed for at leasttwelve years. The bus operator's vote affirmed CCBOE's past practice as required by the newly created W. Va. Code §18A-4-16(5).

10. No official CCBOE action was taken to adopt the votes of the bus operators.

Issues

Grievant contends CCBOE violated W. Va. Code §§18A-4-8b and 18A-4-16 when he was not allowed to accept both extra runs at the same time. Grievant argues he was the most senior applicant for the positions, and CCBOE is required to place him into both. CCBOE points out the postings designate no certain days for these TAG runs as the schedule can vary with little notice throughout the school year. This possibility for conflict is the main reason bus operators are allowed to serve in only one of these positions at a time. CCBOE also argues that it followed a long-term practice which has now been ratified by a vote of the bus operators. Further, CCBOE states neither of the above-cited Code Sections mandates the number of daily extracurricular runs a school board must assign to a bus operator and does not prevent CCBOE from allowing other bus operators an opportunity to earn extra compensation.

Discussion

Before deciding whether these runs were awarded improperly, it is first necessary to decide what type of assignments they were. CCBOE identified the runs as extracurricular assignments. W. Va. Code §18A-4-16 states:

Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularlyscheduled 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.

The runs at issue involve "instructing . . . students" and "occur on a regularly scheduled basis," but they do not occur "at times other than regularly scheduled working hours." However, the definition of extracurricular runs more closely matches these runs than the definition of extra-duty runs which are defined as:

Irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets, and band festival trips.

W. Va. Code §18A-4-8b.

Accordingly, these runs will be viewed as extracurricular runs.

In March 1994, the Legislature amended W. Va. Code §18A-4-16 by adding this subsection:

(5) The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment. (1981, c. 100; 1982, c. 58; 1994, c. 52.)

It is unclear, in the above cited section, whether the reader is referred to paragraph 1, dealing with the general filling of positions, or paragraph 6, dealing with filling extra-duty assignments, of W. Va. Code §18A-4-8b. It is assumed, for purposes of this decision, the reader is referred to paragraph 1, mandating filling service personnel positions on the basis of "seniority,qualifications and evaluations of past service." Thus, Grievant should be awarded both positions unless the county's bus operators have adopted an alternative procedure.

CCBOE's long-term practice had been to limit bus operators to one extra run during school hours. These positions were posted and then filled on the basis of seniority. After Section (5) was added to W. Va. Code §18A-4-16 in Spring 1994, bus operators voted on August 25, 1994 to affirm CCBOE's past practice and reject the W. Va. Code §18A-4-8b method by a vote of 12 to 78. CCBOE did not reaffirm this vote as this was already their longstanding practice. Thus, Grievant's seniority gives him priority in choosing the extracurricular assignment of his choice, but does not given him the right to both positions.

Additionally, the posting clearly stated "[t]he students vary from day to day causing the run to vary daily." Past history has proven the truth of this statement. In fact the daily schedule in the second posting changed after the posting and prior to Grievant assuming the position. The proven potential for conflict in the assignments, also supports CCBOE's decision.

The above-discussion will be supplemented by following conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving this grievance by a preponderance of the evidence.
2. CCBOE did not violate W. Va. Code §§18A-4-8b and/or 18A-4-16 when it required Grievant to choose between two separate extra runs, which ran at the same time and were subject to change.
3. CCBOE followed the mandate of W. Va. Code §18A-4-16 (5) by following the alternative procedure adopted by their bus operators.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 1995