DAVID JENNINGS,

Grievant,

v. DOCKET NO. 96-55-322

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, David Jennings, is employed by Respondent, Wyoming County Board of Education, as a bus operator. Grievant alleges a violation of W. Va. Code §18A-4-8b, stating that Respondent disregarded the rotational seniority list requirement for assigning extra duty work during school year 1995-96. The grievance was denied at Levels I and II, and was waived at Level III. A Level IV hearing was held on February 4, 1997, and the case matured for decision upon receipt of the parties proposed findings of fact and conclusions of law on March 4, 1997. For administrative reasons, the grievance was reassigned on October 25, 1997. (See footnote 1)

FINDINGS OF FACT

1 1. Grievant has been employed by Respondent as a bus driver for more than eight years. (L II, Tr. p. 7.) 2 2. Respondent's practice is to assign bus drivers to specific geographical areas. When extra duty bus runs are available, they are assigned to drivers assigned to that area. Drivers who wish to be eligible for extra duty assignments must contact the principal at each school in the area for which they wish to drive.

3 3. During school year 1995-96, Grievant was assigned to the "Mullens/Herndon area" which includes both Herndon Consolidated Grade School (Herndon) and Mullens High School (Mullens). (L II, Tr. p. 8.) Grievant notified the principals of each school that he wished to take extra duty assignments.

4 4. Grievant received between five and ten extra duty bus runs for Herndon, and does not complain of the assignment of extra-duty runs from Herndon.

5 5. Grievant and nine other drivers were placed on the extra duty assignment list at Mullens.

6 6. During school year 1995-96, a total of 41 extra duty bus runs were taken from Mullens. Of these, Grievant was given ten assignments. Grievant was assigned two overnight trips, for which each day was considered a separate assignment. On one of these overnight trip, Grievant became ill during the night and was unable to make the extra-duty return trip. Thus, Grievant drove the bus as extra-duty on nine occasions.

7 7. Don Nuckols, Principal of Mullens High School, was responsible for calling bus drivers to offer extra duty trips. He attempted to contact Grievant by telephone each time Grievant's name came up on the rotation list. His attempts to contact Grievant often did not succeed. At times, no one answeredGrievant's home telephone, although it had an answering machine attached to it for part of 1995-96. Mr. Nuckols left messages for Grievant about extra duty trips with the secretary or principal of Herndon school at least five times during school year 1995-96. Grievant did not always return his calls.

8 8. Grievant declined extra-duty work on at least one occasion.

9 9. In making extra duty assignments, Mr. Nuckols attempted to contact each of the bus drivers in order on the rotation list to offer them the run. On the occasions where it appeared from Grievant's Exhibit 1 (which lists all 1995-96 extra-duty trips and who made them) that more senior drivers were skipped, more senior employees either declined or did not return calls. However, Mr. Nuckols did not recall for each assignment who was contacted, who declined, and who failed to respond.

DISCUSSION

Extra-duty assignments are governed by W. Va. Code §18A-4-8b, paragraph 6, and are to be made as follows:

> 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.

There is no allegation here that Respondent's rotation list was flawed. The issue is whether Respondent properly implemented the statutory provision in assigning work to the persons listed. Inherent in the issue is the question of how Respondent "gives priority" to employees in rotational order until all employees "have had an opportunity to perform" extra-duty work. Must Respondent somehow ensure each employee actually receives an extra-duty assignment, before allowing the

next person on the list extra- duty?

Few cases directly address this issue in clear language, so some recourse is needed to dicta (observations made in an opinion which are not actually the rule of law made in a case) and to cases involving service personnel called to substitute, rather than for extra-duty. In the substitute service cases, the statutory provisions regarding the order in which substitutes are to be employed is substantially similar, and therefore their holdings have value here. (See footnote 2)

Dicta on page seven of Johns v. Putnam County Bd. of Educ., Docket No. 91-40-151 (July 22, 1991), suggests that the statutory language mandates an offer to employees of extra duty, as opposed to actual assignment of the work. (See footnote 3) Although the statute may be subject to some interpretation, the position espoused by the Johns dicta, that W. Va. Code §18A-4-8b requires an offer rather than actual assignment, has been accepted as the proper interpretation. Lentz v. Berkeley County Bd. of Educ., Docket No. 89-02-153 (Sept. 22, 1989) held that W. Va. Code §18A-4-8b requires that a "reasonable effort shall be made to contact employees for the purpose of offering extracurricular assignments." (See footnote 4) The question then becomes, "What constitutes a reasonable effort to contact employees for offering assignments?" Some good faith, reasonable effort to contact the employee is essential, but an employer need not go to extreme lengths to ensure the employee is aware of the availability of the work. How far the employer must go depends, at least in part, on the specific circumstances of each case.

In Hurley v. Mingo County Bd. of Educ., Docket No. 92-29-068 (Feb. 19, 1993), attempted telephone contact was discussed in some detail. The practice of not leaving messages on answering machines when trying to find a substitute secretary was found reasonable, and discretion for each administrator to choose whether to leave messages or how long to let the phone ring was acknowledged.

> [T]he mere fact that [Grievant's answering] machine did not contain a message from any Board official does not mean that a call was not attempted. It is possible that the caller did not let the phone ring long enough, that the caller, after hearing the recorded message, decided not to leave a message, that the machine was not set to record messages, or that the Grievant or her husband was home and on the phone. In conclusion, it is determined that Grievant has not met her burden of proving by a preponderance of the evidence that an agent of the Board... did not attempt to call her at her home to inquire whether she would be willing to substitute for a regular employee. (Footnote omitted)Id., at 6-7. Although not explicitly stated, Hurley clearly stands for the proposition that an employer's attempt to contact persons on the substitute roster in proper order by telephone is sufficient.

In Messer v. Mingo County Bd. of Educ., Docket No. 89-29-709 (Apr. 30, 1990), a case involving

assigning work to substitute aides, the respondent's principal received a list of substitutes from the central office which did not include the grievant's phone number. The list indicated the grievant was first on the rotation list. However, the second person on the list, whose number was provided, was contacted and assigned the work. The grievant's application to the central office had included her phone number, her husband's name (under which the number was listed in the telephone book) and her address.

In Messer, a violation of the statutorily-mandated rotation for assignments was found. The case held that the principal was not allowed to bypass the grievant, simply because the central office list omitted her telephone number. He should have either contacted the central office, or looked in the telephone directory, to find a means of contacting her. Messer strongly implies that an employer's agents must ensure that offers are extended to employees in proper order, even when some inconvenience results and when affirmative action is required on the agent's part to do so.

In Lentz, supra, the respondent was seeking to assign an extra-duty bus trip scheduled to start at 4:00 p.m. The principal had tried to contact the grievant at home between 9:42 and 9:58 a.m. Someone answered the telephone and said the grievant wasprobably on her mid-day bus run. Respondent knew the grievant's schedule, and also the bus' destination, and could have called for her there when she arrived at 10:15. It was concluded that, under these circumstances, there was no emergency requiring immediate action, and "the grievant could and should have been contacted at the vo-tech center upon her arrival." Id., at 3.

In Lentz, it was found that "[a] telephone call possibly made within two minutes of the bus operator's scheduled departure to complete a mid-day run with no call to her point of destination does not constitute a reasonable effort to contact the employee." Conclusion of Law 1, Id. Lentz suggests that some accommodation of an employee's work schedule is required, at least when the employee is away from home on the employer's behalf, when that schedule is known to the employer, and prevents the employee from being contacted for a relatively short period of time.

Based upon the above cases and the statutory language, it is held that a reasonable, good faith attempt to contact employees, in rotation list order, is all that is required by the statute. Attempts to make contact by telephone are generally acceptable. Whether the attempt made is sufficient must be determined on a case-by-case basis.

Here, Grievant testified that he was not offered numerous extra-duty assignments during the

school year, that he returned calls from Mr. Nuckols, and that he only declined extra-duty assignments from Mullens twice (once due to a conflicting assignment from Herndon, and once due to illness). However, Respondent presented testimony that Mr. Nuckols had attempted tocontact Grievant by telephone when his name came up on the rotation list, often unsuccessfully. Respondent also noted that Grievant had driven nine of the entire forty-one trips taken at Mullens for the entire school year -- as many extra-duty trips as any other employee, and more trips than all but one other employee.

It appears that Principal Nuckols made a good faith attempt to contact Grievant by telephone, either at home or at Herndon school. Grievant actually received a reasonable proportion of the year's extra-duty assignments. While Grievant may not have received all messages from Mr. Nuckols, Grievant simply did not prove that any agent of Respondent had failed in its duty to make a good faith effort to contact him.

CONCLUSIONS OF LAW

1 1. In a non-disciplinary grievance, the burden of proof is on the grievant to prove all elements of his case by a preponderance of the evidence. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). See also, W. Va. Code §18- 29-6.

2 2. W. Va. Code §18A-4-8b, ¶ 6 mandates only a reasonable, good faith attempt to contact employees, in rotation list order.

3 3. Attempts to contact employees by telephone are generally acceptable, although the reasonableness and good faith of the attempts must be determined by examining the specific facts of each case. 4 4. Grievant failed to prove that Respondent did not make reasonable, good faith attempts to contact him in proper rotational order, in assigning extra-duty bus runs.

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

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

Dated: November 18, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

Respondent objected to the grievance at Level IV on grounds that it was untimely (being filed later than the first extra-duty assignment at issue), and moot (in that no relief was requested in the original filing). No timeliness defense can be raised at Level IV, as it was not raised at Level II. W. Va. Code §18-29-3(a). At Level IV, Grievant sought to amend the original grievance filing, to request back pay to fifteen days prior to the filing, arguing that the relief sought was necessarily implied by his original challenge to the extra-duty assignment activities. The amendment was allowed by the Administrative Law Judge who presided over the Level IV hearing, and that ruling will not now be reconsidered. Respondent's affirmative defenses fail.

Footnote: 2

"Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in the particular category of employment, shall be given priority in accepting assignments throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis..." W. Va. Code §18A-4-15.

Footnote: 3

Johns addressed a claim that extra-duty bus runs were not being uniformly assigned pursuant to W. Va. Code §18A-4-5(b). The grievants had been mandated to attend in-service training rather than completing their extra-duty assignments, while several other drivers were allowed to miss the in-service training in order to complete their extra-duty runs. The case found that the drivers who were allowed to complete the extra-duty assignments, rather than attend training, were only allowed to do so by mistake, and the uniformity provision was not applicable.

Footnote: 4

Although the decision uses the term "extracurricular assignments," the case involved extra-duty assignments.