CHRISTINE ZIRKLE, et al.,
Grievants,

v. **Docket No. 97-15-472**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievants, Christine Zirkle, Valerie Tibbs, Judy Teller, Pam Smith, and Terri Nelson, employed by the Hancock County Board of Education (HCBE) as bus operators, allege a violation of W. Va. Code §18A-4-8b occurred when they were not offered extra-duty assignments. The grievances were denied at levels one and two. Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(d). Upon appeal to level four, the grievances were consolidated for hearing conducted on April 16, 1998.[1] The matter became mature for decision with the submission of proposed findings of fact and conclusions of law on May 18, 1998.[2]

At issue in this matter are two extra-duty assignments. The first assignment involved was to transport the Oak Glen football team on August 25, 1997. Grievants Zirkle and Tibbs assert they were bypassed in rotation and were not called or offered the assignment. Grievants Nelson, Smith, and Teller all claim they were not called in order of rotation for the second assignment, a trip from Broadview Elementary School to Heinz Hall in Pittsburgh, PA, on October 7, 1997. Grievants request compensation for the run which they would have accepted.

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[1]Grievants Teller, Smith, and Nelson had pursued a separate grievance which was assigned Docket Number 98-15-017, prior to consolidation.

[2]Grievants were represented by Owens Brown of WVEA; HCBE was represented by Hancock County Assistant Prosecuting Attorney William Fahey.

HCBE argues that in both instances each of the Grievants was called, as required by the practice in effect at the time. After receiving no answer, HCBE asserts that it properly proceeded to the next name on the list until a bus operator agreed to accept the assignment.

Grievants Zirkle and Tibbs submitted HCBE's "Extracurricular Trip Sheet Calls" for August 22, 1997. This document provides information which indicates that Mr. Stewart would take the Oak Glen football assignment on August 25, 1997. Next on the list was "Weir High Volleyball" also scheduled for August 25, 1997. Under this heading was a list of nine names, including Grievants Zirkle and Tibbs, who were called at 12:58 and 12:59 [p.m.], respectively. The record includes "N/A" after Grievants' names, signifying no answer to the call. An employee named McClain accepted this assignment. Immediately following is what appears to be a duplicate entry of the Oak Glen football assignment, with a notation that Mr. Stewart accepted the assignment at 1:12 [p.m.]. Both Grievants Zirkle and Tibbs testified they were home at 12:58 p.m. and 12:59 p.m., and they were not called.[3]

At the request of a number of bus operators, HCBE changed the call procedure by October 6, 1997, and made two attempts to contact each bus operator to offer them an extra-duty assignment before proceeding to the next name on the list. HCBE records submitted by Grievants Nelson, Smith, and Teller, establish that Grievant Nelson was called at 9:40 and 9:43 [a.m.], Grievant Teller was called at 9:44 and 9:47 [a.m.] and Grievant Smith was contacted at 9:50 and 9:53 [a.m.] on October 6, 1997. The document

[3]There appears to be no confusion by the parties that the assignment in question was to transport the Oak Glen football team.

also indicates the caller received no answer to any of the calls.

Grievant Nelson stated that she was not home at the time, but was at the garage washing her bus. She also stated that had she been called, someone at home would have notified her. Grievant Teller testified that she was at home, but stated that she could have missed a call while walking her dog, or was in the bathroom. Grievant Smith stated that she was at home and was not called.

W. Va. Code §18A-4-8b provides in pertinent part:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service 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 extra duty 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 then shall be repeated . . . .

HCBE utilizes the rotational cycle, and has apparently tried a variety of means to implement the procedure. Testimony was given by Grievants that some bus operators had been contacted by their bus radio. Telephone calls were made to the employees' homes, and when dissatisfaction was expressed, HCBE then changed its procedure to call each employee twice before proceeding to the next name on the list. Both parties have expressed legitimate concerns in this matter. Grievants are eager to accept extra-duty assignments, and do not want to miss their turn in the rotational order. HCBE must fill the assignments, and may need to do so within a limited period of time. Nevertheless, the issue in this matter is limited to whether Grievants were bypassed in the rotational call-out.

As this grievance does not involve a disciplinary matter, Grievants have the burden

of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, . . . [and the witnesses'] opportunity for knowledge, information possessed, and manner of testifying [that] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. At 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957).

Grievants are in the difficult position of proving that something did not happen. They have offered their testimony for this purpose. They have also offered documentation prepared by HCBE during the course of business, which indicates that they were in fact called. Additionally, HCBE presented the testimony of Judy Wilson, a secretary assigned to the Transportation Department. Ms. Wilson stated that she was new in the position, and acknowledged that errors were made; however, she did confirm that the times listed on the call-out sheets accurately reflected when the calls were made. In consideration of the evidence available, it is determined that Grievants have failed to prove that they were bypassed on the rotational call-out list.

In addition to the foregoing, it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievants are employed by the Hancock County Board of Education as bus operators. Grievants are assigned regular bus runs and also perform extra-duty runs as they are available.

2. Grievants assert they were not called in rotational order for extra-duty runs in September and October 1997.

3. HCBE records establish that Grievants were called, but there was "no answer".

4. The assignments in question were awarded to other employees.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, .

. . [and the witnesses'] opportunity for knowledge, information possessed, and manner of testifying [that] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. At 1064.

3. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957).

4. Grievants have failed to prove that they were bypassed on the rotational call-out list for extra-duty assignments.

Accordingly, the grievance is **DENIED**.

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

Date: July 7, 1998

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE