BURL SIMERS and

LOY BADGETT,

Grievants,

v. **Docket No. 99-07-025**

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On November 9, 1998, Burl Simers and Loy Badgett (Grievants) filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contending that they were being required to work on a bus which is not owned by Respondent Calhoun County Board of Education (CCBE) in violation of W. Va. Code §§ 18-5-13, 18-5-5, and 18A-4-8. After their grievance was denied at Level I, Grievants appealed to Level II where an evidentiary hearing was conducted on December 18, 1998. The grievance was denied at Level II in a decision issued by CCBE Superintendent Ronald Blankenship on January 4, 1999. Grievants appealed to Level IV on January 13, 1999, by-passing Level III as authorized by W. Va. Code § 18-29-4(c). Following a pre-hearing telephone conference on February 19, 1999, the parties agreed to cancel the scheduled Level IV hearing and submit this matter for decision upon the record developed at Level II, as supplemented by a Stipulation of Facts between the parties at Level IV. In accordance with a briefing schedule established onMarch 10, 1999, this matter became mature for decision on March 31, 1999, following receipt of the parties written arguments. (See footnote 1)

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant Simers is employed by Respondent Calhoun County Board of Education (CCBE)

as a Chief Mechanic, one of the class titles for school service personnel in W. Va. Code § 18A-4-8. Grievant Badgett is similarly employed by CCBE as a Mechanic.

2. Bus # 71 is owned by the Calhoun County Athletic Boosters (Boosters), a private, non-profit organization. Bus # 71 was previously owned by CCBE and was sold to Boosters.

3. Subsequent to the transfer of Bus # 71 to Boosters, CCBE officials have ordered Grievants to perform work on Bus # 71 in the course of their duties as either Chief Mechanic or Mechanic.

4. Bus # 71 is used by Boosters to transport students to selected school-related events. In particular, Bus # 71 is used for extracurricular activities. Coaches and other extracurricular activity sponsors perform the majority of their extracurricular duties outsidetheir regular scheduled workday. Grievants perform all maintenance on Bus # 71 during their regular scheduled workday.

5. Prior to the purchase of Bus # 71, Boosters owned a Dodge van. Grievants were not required to perform any maintenance work on the Dodge van.

6. CCBE's Transportation Supervisor, Donald Pitts, does not have direct control over the use of Bus # 71.

7. The state school bus inspector does not inspect Bus # 71, and it does not have a current school bus inspection sticker. Bus # 71 has a regular inspection sticker as required for all vehicles used on the highways in West Virginia.

8. Bus # 71 is eighteen years old. The state school bus inspector has expressed concern over the age of this vehicle, as well as its braking system, noting that larger and newer buses are equipped with air brakes.

9. Grievant Simers has expressed his concerns regarding the safety of using Bus # 71 to transport children to his supervisor, Mr. Pitts.

10. School buses are not permitted to have jump seats or portable seats. On multiple occasions, Grievants have observed “beanbag seats” on Bus # 71 in the vicinity of and obstructing the rear emergency exit. The most recent observation of this situation occurred on January 31, 1999. Grievants have expressed their concerns regarding this situation to Mr. Pitts.

11. Grievants have a letter in their respective personnel files dated April 14, 1981, expressly forbidding any work on personal vehicles in the county garage at any time. The letter indicates that the state auditor had warned Respondent that working on privately owned vehicles in the county bus garage was prohibited by W. Va. Code § 18-5-19.

12. Grievants, along with a bus operator/mechanic, maintain the following county board of education vehicles: twenty-three buses in regular use; five spare buses; one spare handicapped bus; four pickup trucks; an end loader; a two-ton dump truck; a box truck; and assorted lawn mowers and tractors.

DISCUSSION

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

Grievants contend that CCBE failed to comply with W. Va. Code §§ 18A-4-8, 18-5-5, and 18-5-13, by assigning them to work on a motor vehicle which is not owned by CCBE. Grievants note that W. Va. Code § 18A-4-8 defines the job title, “Chief Mechanic,” as “personnel employed to be responsible for directing activities which ensure that student transportation or other board-owned vehicles are properly and safely maintained.” W. Va. Code § 18A-4-8 similarly defines “Mechanic” as “personnel employed who can independently perform skilled duties in the maintenance and repair of automobiles, school buses and other mechanical and mobile equipment to use in a county school system.” Grievants argue that the foregoing language limits them to working on board-owned vehicles and equipment. W. Va. Code § 18-5-5 describes the corporate character of county boards of education, and generally describes a board's power to contract. W. Va. Code § 18-5-13(6)(a) more specifically describes the authority of county boards of education concerning transportation matters as follows:

> To provide at public expense adequate means of transportation, including transportation across county lines, for all children of school age who live more than two miles distance from school by the nearest available road; to provide at public expense and according to such regulations as the board may establish, adequate means of transportation for school children participating in board-approved curricular and extracurricular activities. . . .

Pursuant to W. Va. Code §§ 18-2-5, 18-5-14, and 17C-14-12, the West Virginia Department of Education has issued School Transportation Regulations as Policy 4336, 143 C.S.R. 92 (1994). Although CCBE argues that provisions in this administrative rule support its position in this matter, it

is not apparent to the undersigned that these regulations apply to the bus in question, because the parties have stipulated that this private bus has a regular motor vehicle inspection sticker, rather than a school bus inspection sticker from the Department of Education. The parties further stipulated that this bus is not inspected by the state school bus inspector. If this were a bus “being operated to transport pupils” within the meaning of the transportation regulations, it would be inspected in accordance with those regulations. CCBE cannot selectively choose which portions of the transportation regulations are applicable to this vehicle.

It is well established that county boards of education generally have substantial discretion in matters relating to the assignment of school personnel, so long as that discretion is exercised reasonably, in the best interests of the schools, and in a mannerwhich is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). On the other hand, it is equally axiomatic that "school personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

The issue to be resolved in this grievance is whether CCBE is prohibited from directing Grievants to perform maintenance work on a privately-owned bus used to transport CCBE students to and from extracurricular activities. Grievants initially assert that the language defining their classification in W. Va. Code § 18A-4-8 restricts them from working on a vehicle which is not the property of the county board which employs them. W. Va. Code § 18A-4-8 defines “class title” as “the name of the position or job held by service personnel.” Generally, “statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.” Syl. Pt. 3, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975). See Barker v. Lincoln County Bd. of Educ., Docket No. 98-22-496 (Mar. 30, 1999). The undersigned finds no language in W. Va. Code § 18A-4-8, or other statutes regulating the employment of school service personnel, which indicates the Legislature intended to limit the employer's authority to assign work to service employees based upon descriptive language explaining appropriate classification titles.

CCBE has properly instructed Grievants not to work on their personal vehicles at the bus garage, whether on or off duty. This appears to be a reasonable effort to avoid the use of public property for private gain. See Evans v. Hutchinson, 158 W. Va. 359, 214S.E.2d 453 (1975). Although it is understandable that Grievants might question the decision to permit them to work on one privately-

owned vehicle, but not others, the vehicle in question is not the personal property of an individual, but belongs to a private organization closely affiliated with CCBE, and is being used for transportation of students participating in extracurricular activities. W. Va. Code § 17C-14-12 expressly authorizes a county board of education to either operate its own school buses, or transport students using privately owned and operated buses under an appropriate contract. W. Va. Code § 18-5-13(6)(a) authorizes county boards to transport pupils at public expense, leaving to the board's discretion whether that transportation be provided by board employees or a private contractor. The fact that CCBE has stopped short of exercising its authority to contract for the private maintenance and operation of this particular vehicle does not mean that Grievants are improperly being required to maintain the booster club's bus.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving 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. W. Va. Code § 18A-4-8 defines “Chief Mechanic” as “personnel employed to be responsible for directing activities which ensure that student transportation or otherboard-owned vehicles are properly and safely maintained, ”and “Mechanic” as “personnel employed who can independently perform skilled duties in the maintenance and repair of automobiles, school buses and other mechanical and mobile equipment to use in a county school system.”

3. The class titles and definitions in W. Va. Code § 18A-4-8 are not intended to limit a county board of education's inherent authority to assign duties to school service personnel.

4. In accordance with W. Va. Code § 17C-14-12, a county board of education may either operate and maintain its own school buses, or transport students using privately owned and operated buses under an appropriate contract.

5. In the circumstances presented, requiring Grievants to perform maintenance on a bus that is owned by a private organization and used to transport students to and from extracurricular activities does not constitute the use of public property for private gain. See Evans v. Hutchinson, 158 W. Va. 359, 214 S.E.2d 453 (1975).

6. It is not contrary to any statute, policy, rule, regulation, or written agreement to require Grievants to perform maintenance work on the vehicle in question.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Calhoun 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 28, 1999

Footnote: 1

Grievants were represented by counsel, John Roush, of the West Virginia School Service Personnel Association. CCBE was also represented by counsel, Howard Seufer, with Bowles Rice McDavid Graff & Love.