EARL ARBOGAST and

MARY THOMPSON,

Grievants,

V V.

DOCKET NO.98-36-294

PENDLETON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants, Earl Arbogast and Mary Thompson, are employed by Respondent, the Pendleton County Board of Education, as regular bus operators. On March 31, 1998, the Grievants received a letter from R. Paul Clayton, Superintendent of Pendleton County Schools, informing them that their names would be placed on the transfer list for the 1998-1999 school term along with several other bus operators. As grounds for their placement on the transfer list, the Superintendent explained that "the school system is in the midst of consolidation and re-organization of its schools" and a "re-design of bus routes due to the proposed consolidation of the high schools" was necessary. (See footnote 1)

Both Grievants requested hearings before the Pendleton County Board of Education to protest

their proposed transfers. Grievants' requests for a hearing were granted, and on April 21,1998, a hearing was held before the Pendleton County Board of Education relative to both Grievants' placement on the transfer list. At the conclusion of the hearing, the Pendleton County Board of Education approved the recommendation that Grievants be transferred for the 1998-1999 school year as a result of the proposed consolidation of the high schools. On April 22, 1998, the Superintendent informed both Grievants, in writing, of the Board's decision to place them on the transfer list

On April 27, 1998, following an informal conference with the Superintendent and Mr. Olin Hoover, the Transportation Director, Grievants lodged their complaint at Level I. In their grievance they alleged the assignment of these “shuttle routes”, transporting high school students from the old Circleville High School (Circleville) to the new Pendleton County High School (PCHS), to them, instead of less senior bus operators, was in violation of W. Va. Code § 18A-4- 8b. They alleged the action was also discriminatory, arbitrary and capricious. Alternatively, Grievants contended that Respondent should have at least posted the “shuttle routes” as extracurricular assignments with additional compensation and that failure to do so violates W. Va. Code §§ 18A-4-16, 18A-2-7, 18A-4-8, and 18A-4-5b.

After their grievance was denied at Level I, the Grievants appealed to Level II. Following an adverse decision rendered by the Superintendent's designee at Level II, the Grievants bypassed Level III and appealed to Level IV on August 24, 1998. A Level IV Hearing was scheduled and held on October 20, 1998 at the Elkins Office of the West Virginia State and Education Employees Grievance Board. (See footnote 2) The matter became mature for decision on December 4, 1998, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Grievant, Earl Arbogast, is a bus operator employed by the Pendleton County Board of Education and has been so employed for the past 29 to 30 years. 2. The Grievant, Mary Thompson, is a bus operator employed by the Pendleton County Board of Education and has been so employed for 19 years.

3. On April 21, 1998, the Pendleton County Board of Education approved the superintendent's recommendation that the Grievants be transferred for the 1998-1999 school year as a result of the

proposed consolidation of the high schools.

4. On April 22, 1998, the Superintendent informed both Grievants, in writing, of the Board's decision to place them on the transfer list.

5. Grievant Thompson's 1997-1998 run required her to begin at Roaring Creek, pick up a number of students before meeting another driver, Dave Sponaugle, exchange students with Mr. Sponaugle, and then proceed to Circleville.

6. During the 1997-1998 school year, Grievant Thompson's bus was a fifty-three (53) passenger bus.

7. Grievant Arbogast's 1997-1998 run required him to transport students from the Cherry Grove, Snowy Mountain Road, Upper North Fork, Dunkard Church, and Snowy Mountain areas to Circleville.

8. During the 1998-1999 school year, both Grievants' runs were changed in order to transport children from the Circleville area to the only remaining high school in Pendleton County located in Franklin.

9. Grievant Thompson's run for the 1998-1999 school year totals approximately 82 miles, round-trip.

10. Grievant Thompson now drives a larger seventy-seven (77) passenger bus in order to accommodate more students.

11. Because her run goes into Franklin, Grievant Thompson has to either stay in Franklin between her morning and afternoon runs, bring another vehicle to get home, or ride with another driver back to the Circleville area.

12. Like Grievant Thompson, Grievant Arbogast's run requires him to take students into the Franklin part of the county.

13. Grievant Arbogast's 1998-1999 run totals approximately 94 miles.

14. Grievant Arbogast drives the same bus as he did last year.

15. Like Grievant Thompson, Grievant Arbogast either has to stay in Franklin after his morning run, bring another vehicle to get home between his two runs, or ride with another driver back to the Circleville area.

16. The route between Circleville and Franklin is fourteen miles on mountainous, narrow roads and takes approximately one half hour to drive in a school bus.

17. Grievant Thompson had to have a second car or ride with someone else in order to return to her home during her morning and afternoon runs during the 1997-98 school year, before the transfer.

18. There are a number of drivers, in addition to the Grievants, that use two vehicles due to the location of their homes, the bus routes that they have, and where the buses are parked.

19. Grievant Arbogast parks his bus at his house at night, so that if he chose to leave a vehicle at the bus garage, he would only require one vehicle between his runs.

20. There are no written or unwritten policies of the Pendleton County Board of Education that provide extra compensation for bus operators that use two personal vehicles andno bus operators receive such.

21. In reconfiguring all of the runs for the 1998-99 school year, no additional bus operators were needed and no bus operators had to be released.

22. The Grievants' drive times and distances are comparable to other bus operators throughout the county, and, in fact, are in some instances apparently less than other drivers.

DISCUSSION

It is axiomatic that the grievants, in a non-disciplinary grievance, must prove his or her case by a preponderance of the evidence. Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).

Essentially, Grievants here claim that two bus operators with less seniority should have been required to take these bus runs instead of Grievants or the reconfigured runs should have been posted, for which both Grievants suggest they would not have applied, thereby relieving them from these “new” runs. In the alternative, they claim that the reconfigured bus runs, necessitated by school consolidations, are not regular runs but are extracurricular in nature.

In this instance, however, it appears the law is clear. In 1995, this Grievance Board ended a split of authority with respect to posting reconfigured bus runs in Mullins, supra. In a case similar to the one at hand, the Logan County Board of Education reconfigured all its bus runs prior to the 1994-95 school year. The grievants were placed on administrative transfer and assigned different routes for the 1994-95 school year. Like the Grievants here, the grievants in Mullins insisted that the positions should have been posted, and that they should have received more favorable runs due to their seniority. The Administrative Law Judge disagreed.

Reversing some prior opinions, the ALJ found that, as is the case here, no positions ofemployment became available through either newly created or vacant positions. The ALJ stated

that:

> [t]he Board simply exercised its discretion to make duty assignments under Code 18A-2-7, to its currently employed bus operators, consistent with the duties contemplated for that type of position. The Board has the same number of employment positions after the reconfiguration as it had before, with the only difference being that some employees have been transferred from one job site to another.

The ALJ then determined that W. Va. Code § 18A-4-8b did not:

> ... mandate that particular duty assignments within a job classification must be posted each time an assignment of duties given to the incumbent within that classification is changed.... The only time that a duty assignment might convert an existing position into a newly created position would be when the nature of the duty assignment is outside the statutory definition of the service personnel position in question.

With respect to reconfigured bus runs, the ALJ held that was not an example of a duty assignment outside the statutory definition of a bus operator, therefore, a new position was not created. Id.

The same facts are presented by the current grievance. The Grievants claim that the reconfigured bus runs were new positions, subject to posting. The Mullins decision, however, establishes that this proposition is incorrect and must be discarded. This Grievance Board has reached similar conclusions in other cases.

In Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996), the Grievance Board found that a board of education did not violate W. Va. Code § 18A-4-8b by assigning a reconfigured bus route to a less senior bus operator without first posting the position. In that instance, the ALJ, relying on Mullins, determined that the number of bus runs and bus operators employed by the board did not change, and, thus, no vacant or newly created positionsexisted.

In a similar case, Damron v. Mingo County Bd. of Educ., Docket No. 95-29-517 (Apr. 30, 1996), this Grievance Board held that a change in route did not result in the creation of a new position, subject to posting. There, as here, the grievant's run was changed for the new school year as a result of Mingo County Schools' reorganization. The ALJ explained that "once hired into the employment position or job of bus operator, the board is authorized, pursuant to its discretionary authority, to assign work duties to that employee. The duties assigned do not become the job or position."

The ALJ went on to rule that:

> Grievant's position or job is that of bus operator, the geographic route he drives and the schools he serves do not control his employment relationship with Mingo." To

> interpret any provision of Code §§ 18A-4-8, 18A-4-8b, or 18A-2-7 to support such a proposition would lead to an absurd result as the nature of the position of a bus operator is itinerant and constantly changing to allow the county boards of education to operate the schools effectively and efficiently, within the best interests of students.
>
> Id.

This appears to be precisely what the Pendleton County Board of Education sought to do when it reconfigured the bus routes in question. Superintendent Clayton testified that in making the decision to consolidate the Pendleton County High Schools, he knew the Board would have to examine the transportation of its students. The Superintendent, Transportation Director, and Transportation Supervisor all testified that the students' safety and minimization of time spent on a bus were paramount in reconfiguring the runs. The Transportation Director, Mr. Hoover, also testified that much effort and time was spent examining the efficiency and effectiveness of the travel time, just as it has been done in the County in the past.

In particular, the Board was concerned with safety and student travel times, and knew thatif existing bus routes were used and simply extended into Franklin, the travel times for students would be great. In determining what was best for the students, the Board looked into what routes could best transport the students to Franklin in terms of terrain, the number of students transported, the connections and transfers that would have to be made, and the travel time.

Superintendent Clayton acknowledged that student safety and travel time had been a big issue raised against the Board of Education in its effort to consolidate schools and was, therefore, one of their priorities when the decision to consolidate was made. For example, Mr. Mallow, the Transportation Supervisor, rode each bus run and collected extensive information on pick-up times, driving distances, turnaround feasibility, bus size, comfort, and terrain. Based upon an analysis of these factors, the Board of Education decided to reconfigure the Grievants' bus runs in order to bring the students to their new school. The decisions of the Pendleton County Board of Education here clearly appear to have been made in the best interests of the children that it serves, did not violate any statutes or regulations, and were not in any way arbitrary and capricious.

Grievants' argument that the reconfigured bus runs are "extracurricular" and, as such, they deserve compensation, is equally without merit. The runs are clearly to be performed as part of a bus operator's regular duties, i.e., to get children to their school See W. Va. Code § 18A-4-16.

There is also no precedent that requires a board of education to consider an employee's seniority

in its decision to reconfigure its bus runs. See Mullins, supra; Conner, supra. In Gunnells v. Mingo County Bd. of Educ., Docket No. 97-29-398 (Dec.17, 1997), this Grievance Board recognized that a board of education "was not bound by statute to allow more senior employees a voice in its transfer decisions."

Finally, the evidence indicates that the Grievants are being compensated uniformly fortheir duties. The testimony established that there are a number of other bus operators throughout the County that have runs relatively equal to, and possibly even longer than, the Grievants. In addition, the testimony affirmed that there are other bus operators in the County who must use two personal vehicles should they wish to return home or to another location between their runs.

In a similar situation previously before this Grievance Board, the ALJ denied a bus driver's grievance because he had not proven that he was being treated differently than the other drivers. Harper v. Pendleton County Board of Education, Docket No. 89-36-708 (August 21, 1990). In that case, a new regular run was created for the grievant, Mr. Harper, by combining a short run with a vocational run. Harper argued that because the vocational run had received additional compensation in the previous year, he should receive additional compensation as well. The ALJ, in denying the grievance, held that:

> [W.Va. Code 18A-4-5b] only requires that uniformity apply to employees who are "performing like assignments and duties within the county," it does not require a board of education to treat employees the same from year to year, nor could the legislature have intended that, once something is done one year, it can never be changed.

In this instance, the Grievants' claims must likewise be rejected. They have not proven that they are being treated differently than other drivers throughout the County with respect to the miles driven, time expended, or for choosing to use two personal vehicles. In fact, the evidence presented clearly indicates the Grievants are being treated in the same fashion as the other bus operators throughout the County.

In addition to the foregoing Findings of Fact, discussion and narration, it is appropriate to make the following formal Conclusions of Law.

CONCLUSIONS OF LAW

1. Grievants, in a non-disciplinary grievance, must prove his or her case by a preponderance of the evidence. Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Weaver

v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).

2. Pursuant to W. Va. Code § 18A-2-7, a county board of education may change a bus driver's bus route either minimally or substantially, without transforming that bus operator's position into a newly created position which must then be filled pursuant to W. Va. Code § 18A-4-8b. Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995).

3. W. Va. Code § 18A-4-5b only requires that uniformity apply to employees who are "performing like assignments and duties within the county," it does not require a board of education to treat employees the same from year to year, nor could the legislature have intended that, once something is done one year, it can never be changed. Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990).

4. A change in route does not result in the creation of a new position, subject to posting. Once hired into the employment position or job of bus operator, a board is authorized, pursuant to its discretionary authority, to assign work duties to that employee. The duties assigned do not become the job or position. Damron v. Mingo County Bd. of Educ., Docket No. 95-29-517 (Apr. 30, 1996).

5. A board of education does not violate W. Va. Code § 18A-4-8b by assigning a reconfigured bus route to a less senior bus operator without first posting the position. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996)

6. Grievants have failed to establish by a preponderance of the evidence that the Pendleton County Board of Education violated W. Va. Code §§ 18A-2-7, 18A-4-5b, 18A-4-8a,18A-4-8b, or acted in a discriminatory, arbitrary or capricious manner.

Therefore, the Grievance is DENIED.

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

Dated: February 26, 1999

_____

R. K. MILLER

Administrative Law Judge

Footnote: 1 *Pendleton County is essentially divided geographically by a mountain into two parts. Prior to the 1998-99 school year, students on the northern side of the mountain attended Circleville High School, while students on the southern side of the mountain attended Franklin High School. The two schools were consolidated for the 1998-99 school year to become Pendleton County High School, which is located in Franklin, WV at the site of the old Franklin High School.*

Footnote: 2 *Grievants were represented at the hearing by their legal counsel, John E. Roush. Respondents were represented by their legal counsel, Kimberly S. Croyle.*