MARY OSBORNE,

Grievant,

v.

DOCKET NO. 00-03-265

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Mary Osborne, filed this grievance against her employer, the Boone County Board of Education ("Board") on June 29, 2000:

> Grievant, a regularly employed school bus operator, held a summer assignment in Respondent's Energy Express summer program. The Grievant held this assignment during the summer of 1999. This assignment was offered and Grievant had accepted this assignment for the summer of 2000. The Respondent subsequently removed the Grievant from this assignment because the Grievant is employed at a Go-Mart convenience store from midnight to 8 a.m., although Grievant's hours could be modified. Grievant alleges a violation of West Virginia Code § 18-5-39.
>
> Relief sought: Grievant seeks reimbursement of wages, benefits, priority for this summer assignment if such exists during the summer of 2001, and interest on all monetary sums. (See footnote 1)

The grievance was denied by Grievant's immediate supervisor, Joe Tagliente, Assistant Superintendent/Director of Transportation, on July 6, 2000. A level two hearing was heldon August 1, 2000, and the grievance was denied by Steve Pauley, the Superintendent's designee, on August 4, 2000. Grievant appealed that decision to level four on August 14, 2000, and the parties subsequently agreed to submit the grievance on the record developed at the lower levels of the grievance process. This matter became mature for decision on December 18, 2000, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq.,

West Virginia School Service Personnel Association, and the Board was represented by Timothy Conway, Esq. (See footnote 2)

SUMMARY OF EVIDENCE

Grievant's Exhibits

None

Board Exhibits

Ex. A -

Boone County Board of Education, Notice of Vacancies Posting Number 172 99-00.

Ex. B -

West Virginia School Transportation Regulations, p. 36.

Testimony

Grievant testified in her own behalf. The Board presented the testimony of Vanessa Drake and Dr. Richard Adkins.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts. 1. The Board posted a Notice of Vacancy in the Spring of 2000, advertising for three bus operators for the Energy Express Summer program, contingent upon enrollment. The notice specified the term of employment as June 26 through August 4, 2000, from 9:00 a.m. until 12:30 p.m. LII Board. Ex. A.

2. Grievant applied for the three positions, and was notified by letter that she had received one of the summer bus runs.

3. Subsequently, it was determined, based upon enrollment, that only two bus operators would be needed for the summer program.

4. Grievant and another bus operator, Vanessa Drake, had the same summer seniority, and were called into the Board office by secretary Shirley Hill, in order to participate in a random drawing

to determine which of them would receive the second bus operator position.

5. Prior to the meeting, Ms. Hill informed Dr. Richard Adkins, Personnel Director, that she believed Grievant had another job at Go-Mart on the night shift, and there might be a problem with hiring her for the summer bus operator position.

6. During the meeting, Dr. Adkins asked Grievant if she had another job, and she responded she worked the night shift at Go-Mart, from 12:00 midnight to 8:00 a.m.

7. Dr. Adkins showed Grievant a portion of the West Virginia School Transportation regulations which provides:

> Any person who performs responsibilities as a bus operator, shall not be eligible to operate a school bus without a minimum of six (6) consecutivehours off duty time, for proper rest, between the conclusion of the previous days' regularly scheduled afternoon run and the beginning of the next day's regularly scheduled morning run.

LII Board Ex. B.

8. Based on that provision, Grievant decided she would not get the job, and left the meeting. Ms. Drake was awarded the second bus operator position.

9. Subsequently, Grievant re-read the regulations and decided it did not necessary prohibit her from driving the summer bus run, and she called her supervisor, Joseph Tagliente, Director of Transportation, and informed him she wanted to have an informal grievance conference.

10. Grievant met with Mr. Tagliente and Dr. Adkins at which time they telephoned Wayne Clutter, the State Director of Transportation. Mr. Clutter opined that the regulations prohibited Grievant from holding the summer bus operator position while also holding the Go-Mart night shift position. Mr. Clutter told them it was his interpretation that the intent of the regulations were to ensure bus operators had a rest period between ending one job and beginning another.

11. In order to make the summer bus run, Vanessa Drake, the successful applicant, arrives at the Madison bus shack at approximately 7:00 a.m., does her pretrip, and picks up her first student at 7:30 a.m. She brings the first bus load of students to the school at 8:35, and then makes a second trip, bringing the next load of students to the school by 9:00 a.m., when school starts.

12. Grievant would have been able to alter her schedule at Go-Mart to allow her to make the summer bus run.

DISCUSSION

Grievant has the burden of proving each element of her 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. Grievant alleges the applicable State Transportation Regulations did not prohibit her from working the night shift at Go-Mart, and then making the Summer bus run from 9:00 a.m. until 12:30 p.m., and it was arbitrary and capricious for the Board to deny her the opportunity to make the Summer bus run.

County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

The Board denies it acted arbitrarily in determining Grievant could not make the Summer bus run while holding the night job at Go-Mart. The Board contends that it has a duty to ensure the safety of the students, and that all facets of school bus operations must be approached with the safety of students being the primary consideration.

As set forth in Finding of Fact No. 7, the application portion of the West Virginia School Transportation regulations provides:

> Any person who performs responsibilities as a bus operator, shall not be eligible to operate a school bus without a minimum of six (6) consecutive hours off duty time, for proper rest, between the conclusion of the previous days' regularly scheduled afternoon run and the beginning of the next day's regularly scheduled morning run.

LII Board Ex. B.

While this regulation does not specifically state the six (6) hours of rest must immediately precede a regularly scheduled run, the Board has relied on Mr. Clutter's interpretation that it was the intent of the regulation to provide that bus operators have a rest period immediately before entering into their duties as bus operators.

Grievant argues that the regulation does not specifically mandate the six-hour rest period occur immediately preceding a bus run, and points to the example of a regularly scheduled school bus operator who works in the morning and afternoons, and then takes a football team on an extracurricular trip that evening, waits for the game to be over, and then transports the team back to the home school. In that instance, not only has the bus operator not had six hours' rest between his last regular trip in the afternoon and the extracurricular trip, it is possible he or she has been working driving the bus for 16 hours. Grievant's point is well taken. I see no difference between the scenario described above, and the scenario presented in this grievance. In this instance, Grievant would have worked eight hours during the evening, and then performed her bus duties for approximately another four hours. Grievant then would have had all day to get the required six hours rest. The regulation does not need interpretation; it speaks clearly for itself. The intent is for bus operators to get sufficient rest, i.e., six hours, between their regularly scheduled bus assignments. Grievant meets the requirements of the regulation.

The Board also interjected an argument that Grievant would not have been available for the Summer bus operator position, because her Go-Mart work schedule conflicted with the necessary hours required for the Summer position. However, Grievant credibly testified she would have been able to adjust her work schedule at Go-Mart to accommodate the Summer bus run, had she been awarded the run.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. West Virginia School Transportation Regulations, Policy 4336, provides that “[a]ny person who performs responsibilities as a bus operator shall not be eligible to operate a school bus without a minimum of six (6) consecutive hours off duty time, for proper rest, between the conclusion of the previous day's regularly scheduled afternoon run and the beginning of the next day's regularly scheduled morning run.”

3. When a policy is clear and unambiguous, it must be applied as written and interpretation

precluded. Bailey, et al. v. West Virginia Department of Transportation, Docket No. 94-DOH-389 (Dec. 20, 1994). 4. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

5. There is nothing in West Virginia Transportation Regulations, Policy 4336, which would prohibit Grievant from performing the duties of a bus operator for the Summer Energy Express Program.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to conduct a random drawing between Grievant and Ms. Drake. If Grievant is the successful candidate, then the Board will reimburse her all salary, benefits, and seniority to which she is entitled for the 2000 Energy Express summer program.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County. Any 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 properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: February 1, 2001

Footnote: 1

Grievant amended her relief at the level two hearing, asking only that the random drawing be conducted, thus giving

her and the successful applicant a fair chance at the position.

Footnote: 2

This matter was reassigned to the undersigned Administrative Law Judge on January 8, 2001.