MAX CROW and GARY WROBLEWSKI,

Grievants,

v.

DOCKET NO. 01-50-488

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Max Crow and Gary Wroblewski, filed this grievance against their employer, the Wayne County Board of Education ("Board") on May 15, 2001, alleging as follows:

> Violation of 18A-4-7a. Transfer to bid job to require teachers to daily ride bus with students is arbitrary and capricious. It is discrimination to require only the teachers at the alternative school to ride with students daily.
>
> Relief sought: Rescind transfer and restore to current position.

The grievance was denied at level one on May 18, 2001, by Michael E. Ferguson, and a level two hearing was held on July 24, 2001. The grievance was again denied by Director of Personnel, James J. Ross, on or about August 14, 2001. Grievants bypassed level three, and appealed to level four on or about August 20, 2001. The level four hearing was held on October 25, 2001, in the Grievance Board's Charleston, West Virginia, office, and this matter became mature for decision on November 26, 2001, the deadline for the parties' proposed findings of fact and conclusions of law. Grievants were represented atlevel two by Judy Davis, American Federation of Teachers ("AFT"), and at level four by Bob Brown, AFT. The Board was represented at level two by Michael Ferguson, and at level four by David Lycan, Esq.

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. A -

Title 126, Legislative Rule, Board of Education, Series 20, Regulations for Alternative Education Programs for Disruptive Students (2418).

Ex. B -

Wayne County Board of Education Alternative Education Policy.

Ex. C -

Unsigned letters to Wilts Salmons, Superintendent.

Ex. D -

March 28, 2001 letter from Wilts Salmons to Gary Wroblewski.

Ex. E -

Alternative school professional personnel daily schedule.

Ex. F -

Wayne County Schools Service Personnel Vacancies, May 25-June 1, 2001.

LIV Grievant's Exhibits

Ex. 1 -

Wayne County Schools Notice of Vacancies-Professional Personnel, July 16-20, 2001.

Ex. 2 -

Wayne County Schools Service Personnel Vacancies, September 28- October 4, 2001.

LII Boad Exhibits

Ex. A -

Grievance Form and level one response dated May 18, 2001, from Michael E. Ferguson to Max Crow.

Ex. B -

July 17, 2001 letters from James J. Ross to Max Crow and Gary Wroblewski.

Ex. C -

March 28, 2001 letter from Wilts Salmons to Max Crow.

Ex. D -

April 12, 2001 letter from Wilts Salmons to Max Crow.

Ex. E -

Board minutes of regular meeting dated April 24, 2001.

Ex. F -

May 2, 2001 letter from Wilts Salmons to Max Crow.

Ex. G -

March 28, 2001 letter from Wilts Salmons to Gary Wroblewski.

Ex. H -

April 12, 2001 letter from Wilts Salmons to Gary Wroblewski.

Ex. I -

Board minutes of regular meeting dated April 24, 2001.

Ex. J -

May 2, 2001 letter from Wilts Salmons to Gary Wroblewski.

LIV Board Exhibits

Ex. 1 -

Daily schedules of Max Crow, Gary Wroblewski, Mr. Preece, and Mr. Heck.

Testimony

Grievants testified in their own behalf. The Board presented the testimony of James Ross and Michael Ferguson.

FINDINGS OF FACT

The material facts of this grievance are not in dispute and are set forth in the following findings.

1. Grievants are teachers employed by the Board at the Buffalo Alternative School. Grievant Crow is certified to teach Math 5-12, and Alternative Education; Grievant Wroblewski is certified to teach Social Studies 5-12, Special Education 5-12, and Alternative Education K-12

2. The Alternative School serves all of Wayne County, and students with disciplinary problems are placed there. There is only one Alternative School in Wayne County, and under the Alternative School system, students attending the school ride buses from their homes to their high schools. The Board then provides a bus from each high school to transport the students to the Alternative School. The process is reversed at the end of the day.

3.

Students from Buffalo Elementary School ride the same buses.

4. During the 2000-2001 school year, the Board received complaints, primarily from parents of Buffalo Elementary students, of disruptive behavior from the Alternative School students on the buses. As a result, the Superintendent assigned a substitute teacher to ride the Buffalo Elementary bus run in the afternoons to monitor the AlternativeSchool students. This duty assignment worked out well, and complaints ceased during the 2000-2001 school year.

5. As a result of the above events, the Superintendent determined there was a continuing need for supervision on the buses that transported the Alternative School students between the high schools and the Alternative School.

6. Therefore, in the Spring of 2001, Michael Ferguson, Director of Federal Programs, asked Grievants to ride the buses, and presented them with this letter for their signatures:

> Rather than be transferred from the Buffalo Alternative School to Unassigned, I agree to be transferred to Buffalo Alternative School to Spring Valley High School where I will ride the bus from the high school with the alternative students to Buffalo

Alternative School and return.

LII G. Ex. C.

7. Grievants refused to sign the letter, and on March 28, 2001, they were informed by Superintendent Wilt Salmons that they were being considered for transfer to unassigned. The reason given for the transfer was that "the number of personnel employed is in excess of the number allowed for funding under the public school support program." LII G. Ex. D.

8. Grievants requested and received a hearing before the Board, and on May 2, 2001, Superintendent Salmons informed them in writing that the Board had accepted his recommendation for their transfers. LII Board Exs. F, J.

9. On or about July 16, 2001, the Board posted a Notice of Vacancies for three (3) teachers at the Alternative School, which stated, "ALL THREE ALTERNATIVEEDUCATION TEACHERS ARE REQUIRED TO MEET AND RIDE THE BUS WITH THE ALTERNATIVE EDUCATION STUDENTS FROM THEIR DESIGNATED HIGH SCHOOL." LIV G. Ex. 1 (emphasis in original).

10. Grievants did not bid on these positions. Thereafter, on August 9, 2001, the Board authorized the Superintendent to fill the vacancies at the Alternative School, and he contacted Grievants to offer them their choice of teaching at either Crum Middle School, Tolsia High School, or the new positions at the Alternative School. Grievants elected to return to the Alternative School.

11. Grievants' schedules, including the bus duty, do not exceed eight (8) hours, and Grievants are provided their planning periods and duty-free lunches.

DISCUSSION

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 § 4.21 (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.

Grievants allege their transfer from the Buffalo Alternative School to unassigned in the Spring of 2001 was arbitrary and capricious, and in violation of W. Va. Code § 18A-4- 7a. (See footnote 1) The

Board argues it was within its right to add bus duty to Grievants' assignments,to transfer them when they refused to perform those duties, and to attempt to assign those teaching positions to other personnel who would accept the bus duty.

When effecting a transfer of professional personnel, W. Va. Code § 18A-2-7 provides the procedure to be followed by the Board, and states, in pertinent part: (See footnote 2)

> (a) The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. *Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees.* Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown. (Emphasis added).

Grievants do not claim any procedural irregularities with their transfers; rather, they claim there is nothing in the Code or applicable policies which permits a county board to assign service personnel duties to professional personnel, and to base their transfers upon their refusal to accept service personnel duties was arbitrary and capricious. In addition, they claim the reason given in their transfer notices, declining enrollment, was not the real reason, which was, in fact, their refusal to agree to perform bus duty. As a general rule, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. State ex rel. Melchiori v. Board of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992). This Grievance Board has held, in cases involving assignments of extra or new teaching duties, that a teaching schedule adjustment, not including the assignment of duties or responsibilities outside of a teacher's presently-utilized area of certification, discipline, department or grade level, is not a transfer subject to the procedures contained in W. Va. Code §18A-2-7. Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989); Dotson v. Greenbrier County Bd. of Educ., Docket No. 13-87-321-4 (March 7, 1988); Gerstner v. Gilmer County

Bd. of Educ., Docket No. 11-87-303-3 (Feb. 17, 1988); Schafstall v. Brooke County Bd. of Educ., Docket No. 05-86-347-3 (March 30, 1987). Furthermore, teachers have no vested right to be assigned to any particular school nor to a particular set of duties. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Weaver v. Bd. of Educ. of Calhoun Co., 128 W. Va. 42, 35 S.E.2d 679 (1945); Mahon v. Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995).

Grievants contend that riding buses, which occurs off the school campus, is entirely encompassed by the definitions of school service personnel, and the Board has improperly crossed the line between professional and service personnel assignments by requiring them to perform these duties. W. Va. Code § 18A-1-1(a) provides that "[s]chool personnel shall be comprised of two categories: Professional personnel and service personnel." Subsection (b) defines "Professional personnel" as "persons who meet the certification and/or licensing requirements of the state, and includes the professional educator and other professional employees." Within that subsection, "Classroom teacher" is defined as, "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity."

By comparison, "Service personnel" is defined as "those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and as aides." W. Va. Code §§ 18A- 1-1(c)(1) and (e). Grievants argue that attendance by a teacher on bus runs does not fit within the definition of a teacher as defined above.

There is no dispute that bus aide duty normally falls within the definition of "Service personnel." However, county boards often require classroom teachers or other professional personnel to perform duties such as hall monitor, lunchroom duty, and chaperoning students on and off the buses at the schools. In Mohn v. Kanawha County Board of Education, Docket No. 93-20-500 (June 27, 1994), it was held that a librarian could rightfully be assigned the duties of a lunchroom supervisor during the normal school day, without additional compensation. In Hussell v. Mason County Board of Education, Docket No. 96-26-073 (July 24, 1996), it was held an assignment for teachers to perform bus duty outside the normal working day could be considered an extracurricular assignment subject to the terms of W. Va. Code § 18A-4-16. (See footnote 3) In the instant case, the bus duty falls within Grievants' regular working hours, and the Board points out, correctly, that there is nothing in the West

Virginia Code or in prior Grievance Board decisions that prohibits teachers from being assigned bus duty, or that such an assignment cannot be made part of the job description for a teaching position being offered for bid by the Board. Therefore, in accordance with Mohn, supra, Grievants can be required to perform bus duty during their normal working hours. (See footnote 4)

Grievants also contend that their transfers should be rescinded because the stated reason in their notifications was not the real reason. While their notices stated they were being transferred because of declining enrollment, there is no dispute but that they were transferred for refusing to accept the bus duty assignment. It is common for county boards to send transfer notices to all employees at the end of the school year, especially in the area of service personnel, in order to more easily effectuate staffing for the upcoming school year. Usually the transfer notice indicates the reason as declining enrollment. The Board argues that every action taken with respect to reductions-in-force and transfers is the result, either directly or indirectly, of declining enrollment, and that the language in the transfer notices is boilerplate language used in all transfer notices. Grievants assert that the amended language contained in W. Va. Code § 18A-2-7 was designed to eliminate mass transfers using this boilerplate language, and to require county boards to only target and notify those employees who will actually be affected by changing circumstances. I agree with Grievants' interpretation of the amendment. However, I do not agree that the Board has violated the statute in this regard with respect to Grievants' transfer.

The evidence shows that the Board determined there was a need to assign bus riding duty to the teachers at the Alternative School for the upcoming school year. Grievants refused to agree to this assignment change, and the Board had no choice but to place them on the transfer list, so that it could hire teachers who would perform the bus duty. This was a school-specific circumstance, and Grievants were targeted as the employees who would be affected by the change, which is precisely what the statute requires. Grievants knew why they were being transferred, and while their transfer notices state “declining enrollment” as the reason, that did not change the circumstances surrounding Grievants' transfers, and in this case, the insertion of boilerplate language in Grievants' transfer notices constitutes harmless error.

CONCLUSIONS OF LAW

1. 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 § 4.21 (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. When effecting a transfer of professional personnel, W. Va. Code § 18A-2-7 provides the procedure to be followed by the Board, and states, in pertinent part: (See footnote 5)

> (a) The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. *Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees.* Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown. (Emphasis added).

3. As a general rule, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. State ex rel. Melchiori v. Board of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992).

4. In cases involving assignments of extra or new teaching duties, a teaching schedule adjustment, not including the assignment of duties or responsibilities outside of a teacher's presently-utilized area of certification, discipline, department or grade level,is not a transfer requiring application of W.Va. Code §18A-2-7. Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989); Dotson v. Greenbrier County Bd. of Educ., Docket No. 13-87-321-4 (March 7, 1988); Gerstner v. Gilmer County Bd. of Educ., Docket No. 11-87-303-3 (Feb. 17, 1988); Schafstall v. Brooke County Bd. of Educ., Docket No. 05-86-347-3 (March 30, 1987).

5. Teachers have no vested right to be assigned to any particular school nor to a particular set of duties. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Weaver v. Bd. of Educ. of Calhoun Co., 128 W. Va. 42, 35 S.E.2d 679 (1945); Mahon v.

Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995).

6. It is permissible for county boards to require classroom teachers or other professional personnel to perform duties such as hall monitor, lunchroom duty, and chaperoning students on and off the buses at the schools, during their normal working hours. Mohn v. Kanawha County Board of Education, Docket No. 93-20-500 (June 27, 1994) .

7. Grievants' bus duty assignment falls within their normal working hours, and they are provided with planning periods and duty-free lunches. Therefore, in accordance with Mohn, supra, there is nothing in statute, law, regulation, or policy which prohibits the Board from assigning this bus duty to Grievants during their normal working hours.

8. The amended language contained in the third sentence of W. Va. Code § 18A-2-7 was designed to eliminate mass transfers using boilerplate language, and torequire county boards to target and notify those employees who will actually be affected by changing circumstances.

9. While Grievants' transfer notices included boilerplate language, in this case it is considered harmless error, as Grievants had knowledge all along that they were being transferred for refusing to agree to perform bus duty.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 13, 2001

Footnote: 1

Grievants alleged a violation of W. Va. Code § 18A-4-7a regarding their transfers; however, transfers are governed by Code § 18A-2-7, and the undersigned will analyze Grievants' claims under the applicable Code Section.

Footnote: 2

W. Va. Code § 18A-2-7 was amended, effective April 14, 2001, including the italicized sentence above.

Footnote: 3

This Code Section provides

> *(1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee andthe superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: . . .*

Footnote: 4

Grievants do not claim the assignment to ride the buses is an extracurricular assignment covered by Code Section § 18A-4-16.

Footnote: 5

W. Va. Code § 18A-2-7 was amended, effective April 14, 2001, including the italicized sentence above.