RANDOLPH WHEELER,

Grievant,

v. DOCKET NO. 01-20-053

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent, and

WALTER CARR, SR.,

Intervenor.

D E C I S I O N

Grievant, Randolph Wheeler, a bus operator, filed this grievance against his employer, Respondent, Kanawha County Board of Education ("KBOE"), after Intervenor, Walter Carr, Sr., was awarded an extra-duty trip on September 30, 2000. Grievant alleged that Mr. Carr had asked to have his name removed from the extra-duty list, and Grievant should have been awarded the trip instead of Mr. Carr. As relief Grievant requested that he be paid for the extra duty trip taken by Mr. Carr. (See footnote 1)

The following Findings of Fact are properly made from the record developed at Level IV.

Findings of Fact

1. Grievant is employed by KBOE as a regular bus operator at the South Charleston bus garage.

2. Walter Carr, Sr., is also employed by KBOE as a regular bus operator at the South Charleston bus garage.

3. Alice Foster is the supervisor of the South Charleston bus garage. Ms. Foster maintains a list of bus operators interested in extra-duty trips. The names are listed from most senior employee at

the top, to least senior employee at the bottom. As an extra- duty trip comes up, she asks the next person on the list if he or she is interested in making the trip. Mr. Carr's name is above Grievant's on the list.

4. On or about September 27, 2000, Grievant, Mr. Carr, and another bus operator, Carl Means, were complaining about employees on the extra-duty list being skipped. Mr. Means stated he was just going to have his name taken off the list, and Mr. Carr said he would just do the same.

5. Mr. Carr went into Ms. Foster's office and closed the door. Ms. Foster was on the telephone. Mr. Carr waited a minute, and then left without speaking to her. As he exited the office, he stopped in the hall outside Ms. Foster's door, and stated he wanted his name taken off the extra-duty list.

6. Ms. Foster heard Mr. Carr talking to Mr. Means outside her office, but Mr. Carr did not tell her directly that he wanted his name taken off the extra-duty list, and she did not remove his name.

7. Ms. Foster will remove a driver's name from the extra-duty list if he discusses the matter with her, and then puts the request in writing. KBOE policy does not require that the request be in writing. 8. If a bus operator asks that his name be removed from the extra-duty list, KBOE procedure requires that if he wants his name returned to the list, he must make the request in writing.

9. Mr. Carr was assigned an extra-duty trip on September 30, 2000, which was nine hours and forty-five minutes. Grievant's next extra-duty trip, on October 5, 2000, was five and a half hours.

Discussion

Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). West Virginia Code § 18A-4-8b addresses extra-duty bus runs, and 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: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

This statutory provision does not address how a bus operator gets his name on or off the extra-duty list. The parties did not address whether KBOE bus operators have adopted an alternative procedure, although there was some testimony about KBOE policy on how a bus operator gets his name on or off the extra-duty list, and it is Grievant's understanding of this “policy” which led to this grievance.

Grievant was adamant that Ms. Foster was not on the telephone when Mr. Carr was in her office, and that Mr. Carr had clearly told Ms. Foster to take his name off the extra-duty list while he was in the hallway, and she responded to him stating, “okay.” Of the five witnesses called to testify about this event, including Mr. Carr and Ms. Foster, only Grievant heard Ms. Foster make any response to Mr. Carr. Two of the witnesses in the same vicinity as Grievant did not know whether Ms. Foster was on the telephone or not when Mr. Carr went in her office, and both Mr. Carr and Ms. Foster testified she was on the telephone, and Mr. Carr did not speak with her.

Regardless of whether Ms. Foster was on the telephone or not, and whether Mr. Carr told Ms. Foster to take his name off the list, Ms. Foster testified she would not take someone's name off the list under these circumstances unless the request was also placed in writing. While no evidence was presented that KBOE policy requires this, no evidence was presented that it precludes this either. It seems like an extremely good practice by Ms. Foster as the supervisor to require an employee to place such a request in writing in order to assure that she has not misunderstood the employee, and she has some evidence other than her recollection of the conversation. Such recollections sometimes prove to be not quite accurate, as was well demonstrated by the recollections of the various witnesses. Nothing required that Mr. Carr's name be removed from the extra-duty list under the circumstances presented here.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996).

2. Grievant did not demonstrate a violation of any law, rule, regulation, procedure or policy, or any other reason that Mr Carr's name should have been taken off the extra-duty list.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 18, 2001

Footnote: 1

After going through the informal conference process, Grievant filed this grievance on October 31, 2000. It was denied on November 14, 2000, and Grievant appealed to Level II on November 16, 2000. A Level II hearing was held on December 21, 2000, and a decision denying the grievance was issued on January 10, 2001. Grievant appealed to Level IV on January 22, 2001. A Level IV hearing was held on April 10, 2001. Grievant represented himself, Respondent was represented by James W. Withrow, Esquire, and Intervenor, Walter Carr, Sr., was represented by Rosemary Jenkins. The parties declined to submit written argument, and this grievance became mature for decision at the conclusion of the hearing.