VIRGINIA KIRK and LARRY WALKER,

Grievants,

v. Docket No. 02-06-005

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Virginia Kirk and Larry Walker, filed this grievance against their employer, the Cabell County Board of Education ("CCBOE") on September 20, 2001. The Statement of Grievance alleges:

> **Violation of WV Code 18-29-2 section a with regard to misapplication regarding compensation of additional two days of bus runs due to the modified calendar at Spring Hill Elementary School.**
>
> **Relief Sought: Relief sought is to be paid same amount of compensation as other contracted days of bus runs and any benefits due.**

This grievance was granted, in part, on September 14, 2001, after the informal conference. Grievants received payment for the time they worked greater than eight hours on the two days at issue. (See footnote 1) The grievance was denied at Level II. Grievants waived Level III and appealed to Level IV on January 10, 2002. The parties agreed to submit this case on the record developed below, and it became mature for decision on January 31, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. **Grievants are regularly employed bus operators.**

2. For the past four years, Grievants have held contracts for summer runs.

3. For the 2001 Summer, these contracts ended on August 20, 2001, but the need for these runs continued on August 21 and 22, 2001.

4. August 21 and 22, 2001, were the first days bus operators were to report back to work for the 2001-2002 school year. Bus operators were required to attend in- service and prepare their buses for the new school year on these days.

5. Grievants' supervisor, Director of Transportation, Patty Pauley, directed Grievants to make these runs on August 21 and 22, 2001, in addition to the required in- service and preparation.

6. Ms. Pauley gave this direction for safety and continuity reasons. She believed it was better for Grievants to complete the runs, as they knew the children and the required stops.

7. The first two years Grievants held these runs, 1998 and 1999, substitutes were hired to complete the run on the in-service and preparation days.

8. In 2000, Grievants completed their runs, attended the required in-service, and prepared for their fall runs. They received their regular pay for these duties.

9. Grievants did not receive additional compensation for the duties described in Finding of Fact 8, nor did they file a grievance.

10. Grievants both worked 9 1/4 hours on both days.

11. Grievants received their regular pay for two full days of work. 12. Grievants then filed this grievance asking for two additional full days of compensation for August 21 and 22, 2001, or in other words four full days of compensation for August 21 and 22, 2001.

13. After an informal conference, Grievants were granted compensation for the two days they worked over eight hours, for a total of an additional 2½ hours for those two days. This amount was one eighth of their daily rate.

14. Grievant Walker received $40.78, and Grievant Kirk received $33.80 for the additional 2½ hours.

15. Some bus operators did not work eight hours on the two days in question, and they received a full day's pay.

16. The normal rate of pay for an extracurricular run is fifteen dollars.

17. Extra-duty runs are compensated on an hourly basis at one seventh of the daily rate.

Issues and Arguments

Grievants, regularly employed bus operators, allege they should have received four full days of pay for August 21 and 22, 2001, because they worked in two separate positions during those two days.

Respondent maintains pursuant to W. Va. Code § 18-4-8h, Grievants cannot be employed in more than one full-time position at a time; thus, they cannot be paid for working two full days in one day. Respondent also noted Grievants only worked 9 1/4 hours each day, and were paid for any hours over eight on the two days in question.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievants note that when they made their summer runs, even though they lasted only three to four hours each day, they received a full day's pay. Additionally, the other bus operators, who did not perform any additional work, were compensated for a full day. While it is understandable Grievants are upset because they had to work more hours than other bus operators, Grievants' request for four, full days of pay cannot be granted.

W. Va. Code § 18-4-8h states:

> **Upon the effective date of this section, no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time: Provided, That nothing herein shall be construed to prohibit a school service personnel from holding an extracurricular assignment or assignments, as provided in section sixteen [§**

> **18A-4-16] of this article, or summer positions, as provided in section thirty-nine [§ 18-5-39], article five, chapter eighteen of this code, norfrom performing extra-duty assignments, as provided in section eight-b [§ 18A-4-8b] of this article, in addition to his or her regular position.**

Grievants also argue the runs on August 21 and 22, 2001, fall outside the parameters of the Code Section because they were for summer positions. Grievants' contracts were for summer positions, but these contracts ended on August 20, 2001, and the regular school year duties for bus operators started on August 21, 2001. Accordingly, the runs made on August 21 and 22 cannot be viewed as summer positions. Grievants were serving in their regular school year contracts at this time.

W. Va. Code § 18-4-8h makes it clear Grievants cannot be paid for two full days of work for working 9 1/4 hours on each of the days in question. No school service personnel can hold two full-time positions at the same time. Miller v. Brooke County Bd. of Educ., Docket No. 98-05-343 (Apr. 26, 1999); Hardman v. Lewis County Bd. of Educ., Docket No. 97-21-181 (Sept. 30, 1997).

However, it would appear the work Grievants performed fell more into the area of extra-duty runs. (See footnote 3) **W. Va. Code § 18A-4-8b defines extra-duty assignments as "irregular jobs that occur periodically or occasionally." This assignment was for two days only. W. Va. Code § 18A-4-8a(8) requires the minimum hourly rate for extra-duty assignment is one seventh of the employee's daily rate of pay. Grievants should be compensated for the amount of time the extra-duty runs took. It was noted that the amount of time listed on the exhibits differed from the time testified to at hearing. The undersigned AdministrativeLaw Judge has decided to use the time identified by Grievants in their sworn testimony. Accordingly, Grievants should receive additional pay for three hours each day, for a total of six hours.** (See footnote 4)

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 § 4.21 (2000); Toney v. Lincoln County

Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. W. Va. Code § 18-4-8h specifies no school service personnel can hold two full-time positions at the same time. Miller v. Brooke County Bd. of Educ., Docket No. 98- 05-343 (Apr. 26, 1999); Hardman v. Lewis County Bd. of Educ., Docket No. 97-21-181 (Sept. 30, 1997).

3. The runs performed by Grievants on August 21 and 22, 2001 were extra-duty runs, and should be compensated at the rate of one seventh of their daily rate. W. Va. Code §§ 18A-4-8a(8) &18a-4-8b(f).

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. Respondent is directed to compensate Grievants for six hours of extra duty pay. This amount is to be subtracted from the amount already received as identified in Finding of Fact 14.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Cabell 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 15, 2002

Footnote: 1

Because even with the additional time Grievants had not worked more than forty hours, overtime is not an issue in this grievance.

Footnote: 2

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by Attorney Howard Seufer from Bowles Rice McDavid Graff & Love.

Footnote: 3

It is of course noted these runs were not filled on a rotation basis, but this ruling is to resolve the issue of this grievance only for this year. The parties are directed to find a mutual way to deal with these runs for the next year, keeping in mind the safety of the students and adequate compensation.

Footnote: 4

It is noted this time is still an approximation, but it is the best calculation from the testimony.