**CHARLENE MCMILLEN,**

**Grievant,**

**v.** **Docket No. 02-30-358**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievant, Charlene McMillen, employed by the Monongalia County Board of Education (MCBE) as a bus operator, filed a level one grievance on July 15, 2002, in which she alleged violations of W. Va. Code §§ 18A-4-8b and 18-5-39, and local practice/policy, when two other bus operators were allowed to exchange summer assignments. For relief, Grievant requests back pay with interest, benefits, and the right to return to the assignment in the future. The grievance was denied at level one, but was granted, and partial relief awarded, at level two. Both parties appealed to level four, and an evidentiary hearing was conducted on January 27, 2003. Grievant was represented by John E. Roush, Esq. of WVSSPA, and MCBE was represented by Kelly J. Kimble, Esq., of Kay, Casto & Chaney. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on February 24, 2003.

The following facts are derived from a preponderance of the evidence submitted at the level two and level four hearings.

### Findings of Fact

1. Grievant has been employed by MCBE as a bus operator at all times pertinent to this grievance.

2. MCBE posted twelve, five day per week, Kaleidoscope bus runs for Summer 2002. Grievant was offered a run in the Blacksville area (Mason-Dixon School). Becausethe assignment was in the western area of the county, a location not convenient for Grievant, she declined the position.

3. The Mason-Dixon assignment was ultimately accepted by Elizabeth Snyder, a bus operator with less seniority than Grievant.

4. Prior to the beginning of the summer term, Ms. Snyder was permitted to trade runs with Cheryl Williams, whose assignment was in the Morgantown area. Ms. Williams also has less seniority

than Grievant, but had driven in the summer program in prior years.

5. Grievant subsequently bid on and was awarded a four day per week run in the Extended School Year program, effective July 15, 2002. Grievant had worked as a substitute prior to accepting this assignment.

Discussion

When a county board of education appeals the level two grievance evaluator's decision, the county board of education has the burden of proof. The standard of review at Level IV is found in W. Va. Code §18-29-3(t), which provides:

Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§18-29-4] of this article and provided both parties in section seven [§18-29-7] of this article.

Winnell v. Kanawha County Bd. of Educ., Docket No. 02-20-240 (Oct. 28, 2002).SeeJackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997); Harmon v. Fayette County Bd of Educ., Docket No. 96-10-500 (Aug. 25, 1997).

At level two, the hearing evaluator found the switch had been improper, and granted the grievance to the extent that he awarded Grievant compensation for five and one-half days, and ordered the runs returned to their original configuration, should they exist in Summer 2003.

Respondent asserts the hearing evaluator improperly awarded Grievant relief because she failed to prove that she would have benefitted had the swap not occurred. Looking at this argument, it would appear Respondent is arguing the decision to award Grievant relief in the form of lost wages is clearly wrong, based on the evidence of record.

The undisputed facts are that Grievant had been offered, but declined the run ultimately accepted by Ms. Snyder. Had Ms. Snyder not been allowed to swap runs with Ms. Williams, she would have retained the Mason-Dixon run. Grievant argued that she would have accepted the run had she known

she could trade with Ms. Williams, and MCBE should have given her that opportunity. Since the swap was improper, it would have been just as wrong for MCBE to have offered it to Grievant as it was to offer it to Ms. Snyder. Therefore, MCBE has proven that the award of lost wages was clearly wrong.

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

Conclusions of Law

1. When a county board of education appeals the level two grievance evaluator's decision, the county board of education has the burden of proof, and the standard of review at level four is found in W. Va. Code §18-29-3(t). Winnell v. KanawhaCounty Bd. of Educ., Docket No. 02-20-240 (Oct. 28, 2002). See Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997); Harmon v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997).

2. A board of education may appeal a level two decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. W. Va. Code §18-29-3(t).

3. Respondent met its burden of proof by demonstrating the decision of the grievance evaluator was clearly wrong to the extent that monetary damages were awarded to Grievant.

Accordingly, the level two decision is overturned to the extent that Grievant was awarded lost wages, and the 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 acopy 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.

**DATE: MARCH 28, 2003** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**