JOHN ANDERSON, et al.

Grievants,

v.

KANAWHA COUNTY BOARD

OR EDUCATION, **DOCKET NO. 05-20-071**

Respondent,

and

DARIS SHAMBLIN,

Intervenor.

DECISION

Grievants John Anderson, Michael Chandler, Calvin Harper, and Raymond Huffman filed a grievance on January 19, 2005, in which they claimed that Respondent, the Kanawha County Board of Education (KCBOE), "failed to post a newly created/consolidated bus route, in violation of West Virginia Code §§ 18A-4-8b, 18A-4-15 and 18A-4-8g, as well as county policy. As relief, they are seeking posting of the position in question. Intervenor Daris Shamblin is the driver of the route in question.

Following the level two hearing and a bypass of the level three hearing, the parties agreed to submit the matter to level four based on the record already developed. Grievants were represented by West Virginia School Service Personnel Association Attorney John E. Roush, Esq., and KCBOE was represented by counsel, James Withrow. Mr. Shamblin represented himself. Proposed Findings of Fact and Conclusions of Law were due by July 9, 2005, at which time the matter became mature for decision.

Issues and Arguments

This grievance concerns two different bus runs, No. 125 and No. 208. Run No. 125 is a half-day evening run, and No. 208 is a full-day run. KCBOE changed Run No. 208 so that the evening part is

now the former 125 run, and Run 125 is now what used to be the evening part of Run 208. Run 125 was and is still vacant, and KCBOE intends to post it, but Mr. Shamblin, who drives the 208 run, has been permitted to retain that modified run. Grievants contend that the 208 run must also be posted as a vacancy, since it has been changed more than 50%, and State law and County policy require such “consolidated” runs to be posted. KCBOE denies that its policy requires the posting of Run 208 even though it has been changed more than 50%. The essential facts are not in dispute.

Based on a preponderance of the evidence contained in the record, I find the following material facts have been proven:

Findings of Fact

1. Messrs. Anderson, Chandler, Harper and Huffman, as well as Mr. Shamblin, are all employed by KCBOE as regular school bus operators stationed at the Elkview bus terminal.

2. In December 2004, KCBOE changed bus routes 125 and 208. Before and after the changes, route 125 was vacant and Mr. Shamblin drove route 208.

3. Prior to the change, bus 208 served the Leatherwood area in the morning and the Cooper's Creek area in the afternoon. Bus 125 served the Leatherwood area in the afternoon only. After the change, bus 208 served the same Leatherwood area in the morning and afternoon, and bus 125 served Cooper's Creek in the afternoon only. The changes allowed bus 208 to transport the same students in the morning and afternoon. 4. KCBOE has established policies for circumstances such as this, and they are contained in Pupil Transportation Personnel Handbook. This Handbook contains various statements of policy pertinent to this matter, such as the following:

> [D.1.] No bus route can be considered static. Routes will be changed as need arises to provide necessary service to pupils and schools.

> [D.3.] An open route created by retirement, resignation, new route etc., which constitutes a vacancy will be posted for five (5) working days prior to assignment. When a run is awarded, the run previously held becomes “open.”

> [F.1.] Runs will not be considered “open” because they have been revised or altered.

> [G.4.] Runs shall not be considered consolidated because they have been revised or altered unless more than fifty percent (50%) of the total run has changed within a school year.

> [G.5.] County seniority within classification will determine which affected employee will have first choice to retain the newly consolidated run. If the newly consolidated run is not desired, the affected employee(s) may select a run at that terminal from anyone who has less county seniority within classification. This procedure will continue until all seniority has been honored at that terminal.

5. Both Route 208 and 125 were changed more than 50%, because the afternoon run is longer than the morning run for route 208, and route 125 was changed entirely. Since Route 125 was vacant, Mr. Shamblin was the only employee affected by the changes. He desired to retain the newly-consolidated Route 208.

6. Mr. Shamblin was permitted to retain the 208 bus run, and KCBOE intends to post the modified 125 run as a vacancy after this grievance is resolved.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *(See footnote 1)* What essentially happened is that a half-time run became vacant, and instead of posting the vacancy, KCBOE replaced the evening portion of Mr. Shamblin's run with the vacant run, and posted what was Mr. Shamblin's evening run as a vacancy. Grievants believe KCBOE, after having made the change to Mr. Shamblin's run, should have posted both half-day and the full-day runs.

Grievants are correct in their contention that, where county policy deviates from state law, state law must prevail as the order of the day. Citing W. Va. Code § 18A-4-8b, which requires county boards to post “all job vacancies of established existing or newly created positions,” and also requires the board to fill those positions based on “seniority, qualifications and evaluations of past service,” Grievants contend the revised 208 run is “a new and different position.” KCBOE argues that, even after having been changed more than 50%, the 208 run is not a new position.

The Grievance Board has already addressed these issues. In *Arbogast and Thompson v. Pendleton County Bd. of Educ.*, Docket No. 98-36-294 (Feb. 26, 1999), the administrative law judge

concluded, “A change in route does not result in the creation of a new position, subject to posting. Once hired into the employment position or job of bus operator, a board is authorized, pursuant to its discretionary authority, to assign work duties to that employee. The duties assigned do not become the job or position.” The same decision also held that “A board of education does not violate W. Va. Code § 18A-4-8b by assigning a reconfigured bus route to a less senior bus operator without first posting the position.” KCBOE's policy, in paragraphs D.1., D.3. and F.1., unambiguously states that runs may be changed and open runs will be posted, but that a change does not automatically create an open run. This is consistent with the Grievance Board's interpretation of W. Va. Code § 18A- 4-8b. Since the statute does not require KCBOE to post the modified 208 run, it is appropriate to look at KCBOE's established policy. Under its policy, KCBOE must consider the 208 run “consolidated.” KCBOE admits that Bus Route 208 was changed more than 50% within the school year, because the afternoon run is now longer than the morning run.

Paragraph G.4. of the pupil transportation policy states that a run will not be considered “consolidated” *unless* it has changed more than 50%, so the inverse, that a run is “consolidated” if it has been changed that much, makes sense as true. The policy then states how the drivers affected by the consolidation will be treated. In paragraph G.5., seniority within the group of drivers affected by the consolidation will determine who gets to keep the altered runs. In this case, because one of the positions was vacant, only Mr. Shamblin was affected. He was properly given the choice of keeping the run or not, and he chose to do so. Nothing in the policy provides for posting of the runs as “open,” even if they are considered “consolidated.” KCBOE did exactly what its policy mandates that it do.

The following Conclusions of Law support this decision:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 Res.*, 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. "A change in route does not result in the creation of a new position, subject to posting. Once hired into the employment position or job of bus operator, a board is authorized, pursuant to its discretionary authority, to assign work duties to that employee. The dutiesassigned do not become the job or position. Damron v. Mingo County Bd. of Educ., Docket No. 95-29-517 (Apr. 30, 1996)." *Arbogast and Thompson v. Pendleton County Bd. of Educ.*, Docket No. 98-36-294 (Feb. 26, 1999)

3. A board of education does not violate W. Va. Code § 18A-4-8b by assigning a reconfigured bus route to a less senior bus operator without first posting the position. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996)." *Arbogast, supra.*

4. Grievants did not meet their burden of proving Respondent was required to post the 208 run after it was modified.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

July 19, 2005

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.