BRIDGETT THOMPSON

Grievant,

v.

Docket No. 05-23-068

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Bridgett Thompson ("Thompson"), grieves the fact that, on October 14, 2004, her employer, respondent Logan County Board of Education ("BOE"), called out two different substitute bus operators to take emergency runs, rather than giving either of the two assignments to Thompson. As set forth in her statement of grievance, "Grievant, a substitute bus operator, contends that she did not receive one of two emergency assignments. The Grievant alleges a violation of West Virginia Code §18A-4-15." For relief Thompson "seeks the payment of lost wages and benefits, if any. The Grievant also seeks the payment of interest on all monetary sums."

This grievance was denied at Levels I and II. Level III was bypassed. Although there was a Level II hearing, it could not be transcribed. At the outset of the Level IV hearing the parties were offered the opportunity to return to Level II to create a new record. This offer was declined.

The Level IV hearing was held on April 12, 2005, in the Charleston office of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") BOE was represented by

its counsel, Leslie Tyree. Thompson was represented by hercounsel, John Everett Roush, of the West Virginia School Service Personnel Association. This grievance matured for decision on May 12, 2005, which was the deadline for the parties to submit proposed findings of facts and conclusions of law. BOE did not avail itself of this opportunity.

Thompson's “Proposed Findings of Fact and Conclusions of Law,” which was received by the Grievance Board on May 12, 2005, contains an argument that exceeds the scope of her statement of grievance. Specifically, Thompson argues that BOE improperly allowed a substitute bus operator, who received one of the emergency assignments at issue in this grievance, to retain that assignment for several weeks. Proposed Findings of Fact and Conclusions of Law at 2, ¶8. There was no attempt at Level IV to amend Thompson's statement of grievance to include this additional ground.

It is unfair and improper to interject a new issue at this stage of the grievance process. BOE was not on notice of this allegation and did not have an opportunity to present evidence and argument to meet it. Therefore, this argument will not be addressed further.

After careful review of the entire record, the undersigned finds that the following facts were either stipulated by the parties, where so indicated, or proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. The parties stipulated to the following facts:

1.0.a a. On October 14, 2004, BOE needed two substitute bus operators on an emergency basis.

1.0.b b. It is considered an emergency assignment when the regular bus operator does not inform BOE about an absence sufficiently in advance of the affected run to allow BOE to go

through the normal seniority-based rotation list of substitute bus operators to get someone to cover the affected run.

1.0.c c. Thompson is a substitute bus operator for BOE. As of October 14, 2004, she had a little over two years of experience in that position.

1.0.d d. Thompson was available on October 14, 2004, and could have covered either of the two “emergency” runs.

1.0.e e. Thompson called the central office to report that she was available for work on October 14, 2004.

1.0.f f. When the first emergency run opened for the afternoon of October 14, 2004, BOE called in Rana Blankenship, a substitute bus operator who had declined a run that morning.

1.0.g g. When the second emergency run opened up on the afternoon of October 14, 2004, the assignment was given to a substitute bus operator who lives closer than Thompson to the bus garage.

2 2. The school bus system in Logan County is divided into three geographic regions where bus garages are located. These are Man, Chapmanville, and Logan.

3 3. Substitute bus operators may drive in all three of the geographic areas.

4 4. Normal call-outs for substitute bus operators occur on a seniority-based rotation.

5 5. Substitute bus operators are called out by either the morning Transportation Supervisor, Jeff Swanner (“Mr. Swanner”), or the afternoon Transportation Supervisor, Beryl Scarberry (“Mr. Scarberry”).

6 6. If a bus operator does not let the Transportation Supervisor know about an absence by a certain time, a substitute is called in on an emergency basis.

7 7. There was no evidence of a formal written policy dealing with how emergency absences by bus operators are to be addressed. However, it is normal practice to treat as an emergency any

absence for an evening run that is not reported before noon. In the event of such emergency, one of the Transportation Supervisors calls the substitute bus operator who lives closest to the bus garage. This practice increases the likelihood that the bus will be on time.

8 8. On October 14, 2004, Thompson did not have an assignment in the morning.

9 9. At approximately 1:00 p.m. on October 14, 2004, Chuck Vincent ("Mr. Vincent") came to the bus garage and asked Mr. Scarberry to place a substitute bus operator on his run in Chapmanville.

10 10. There had been allegations of favoritism in making substitute assignments, so Mr. Scarberry took the matter to the central office for advice on how to proceed.

11 11. Before Mr. Scarberry left the bus garage to go to the central office, another bus operator informed him that Rana Blankenship ("Ms. Blankenship") had called to say that she was available for an assignment that afternoon, although she had not taken a bus assignment on the morning of October 14, 2004, because her husband had been involved in an accident.

12 12. In addition, Darren Morris ("Mr. Morris"), who is a bus operator and friend of Thompson, told Mr. Scarberry that he had eaten breakfast with Thompson and that she was on her way home at that time.

13 13. Dr. Pat Joe White ("Dr. White"), who is the Director of Transportation for Logan County schools, is Mr. Scarberry's supervisor. When he went to the central office, Mr. Scarberry met with Dr. White and Ms. Tyree in Ms. Tyree's office.

14 14. Dr. White reviewed the Substitute Roster. A dark, filled-in circle is used to mark where to start on the roster for the next day. The dot on October 14, 2004, appeared after "Milton Belcher." Resp.Exh.1 at IV. (See footnote 1) Christina Pack was the next substitute on the list. There was a zero next to her name. Dr. White understood the zero to mean that she was unavailable. (See footnote 2)

15 15. The next four substitutes already had assignments or had zeros beside their names. The fifth, Andrea Thomas had a notation by her name that she had been called at 10:30 a.m. but did not call back. The sixth had another assignment that day. This brought the list to Crystal Wooten. She had been called at 10:47 a.m. but there was no answer. The next three substitutes were working. Michael Maynard, who was next on the rotation, was called at 10:57 a.m. but had not answered. Both of the substitutes whose names follow Michael Maynard's had assignments that day.

16 16. The next name on the rotation was "Bridgett Thompson." When reviewing the

Substitute Roster, Dr. White noted that Mr. Swanner had called Thompson as late as 11:00 a.m. on the morning of October 14 but had not gotten an answer. Resp.Exh.1 at IV. Therefore, Dr. White continued looking down the roster for a bus operator to take Mr. Vincent's run.

17 17. The next name he came to after Thompson on the Substitute Roster was Rana Blankenship ("Ms. Blankenship"). When Dr. White remarked that Ms. Blankenship did not appear to be working that afternoon, Mr. Scarberry informed him that, although she had not been available in the morning, Ms. Blankenship had called and said she was available for an afternoon run.

18 18. At approximately 1:05 or 1:10 p.m., Dr. White called and offered Mr. Vincent's run to Ms. Blankenship.

19 19. In the meantime, Thompson's friend, Mr. Morris, had called her and let her know that Mr. Vincent's run was going to be available on an emergency basis. He suggested that she call the central office and let Dr. White's secretary, Melody, know that she was available to take that run.

20 20. Thompson contacted Melody between 1:00 and 1:30 p.m. Melody advised Thompson to stand by, promising to call her back in about fifteen to twenty minutes. When she had not heard back from Melody after about twenty minutes, Thompson called again. This time Melody explained that Dr. White and Mr. Scarberry were involved in discussions and that Melody would call Thompson back.

21 21. During his meeting with Dr. White and Ms. Tyree, Mr. Scarberry did not have any discussions with Dr. White's secretary, Melody. He was not aware that Thompson had spoken with Melody about her availability to take an emergency run.

22 22. Ultimately, when Thompson called Melody for a third time, she was informed that Ms. Blankenship had been given Mr. Vincent's run because she had called in ahead of Thompson.

23 23. While Mr. Scarberry was meeting with Dr. White and Ms. Tyree about Mr. Vincent's run, Dr. White was notified that another bus operator, Denny Johnson, needed a substitute driver for his run in Logan.

24 24. Dr. White asked Mr. Scarberry which substitute lived closest to the Logan bus garage. It was Crystal Wooten, who is also known as Crystal Ellis. Consequently, Dr. White called Crystal Wooten ("Ms. Wooten") to take Denny Johnson's run in Logan.

25 25. When Ms. Wooten arrived at the bus garage, she noticed that Donna Huddleston ("Ms. Huddleston") was present. Because Ms. Wooten had left her child with someone she did not consider

trustworthy, she asked that Ms. Huddleston be allowed to take Denny Johnson's Logan run. This was permitted because there was no other option at that point for getting the bus out on time. Mr. Scarberry reported this change in substitute bus operators to Dr. White, after the fact.

26 26. Of these four substitutes, Ms. Wooten is the most senior, followed in descending order by Thompson, then Ms. Blankenship, and then Ms. Huddleston. Resp.Exh.1 at IV.

Discussion

This is not a disciplinary grievance. Therefore, Thompson bears the burden of proving her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1- 4.21(2004); *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). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

Thompson asserts that BOE's failure to assign her one of the two emergency runs on the afternoon of October 14, 2004, violated West Virginia Code section 18A-4-15(b), which provides that substitute service personnel are to be assigned on a rotating basis in order of seniority. Specifically, West Virginia Code section 18A-4-15(b) provides, in pertinent part, that

> [s]ubstitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A-4-8b] of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments[.]

This seniority-based rotational method of assigning substitute bus operators is followed by the Transportation Supervisors, Mr. Sweener and Mr. Scarberry, in the ordinary course of events. The problem in this case is that Mr. Scarberry received belated notice of the need to supply substitute bus operators for Mr. Vincent's and Mr. Johnson's afternoon routes. Had Scarberry received timely notice, the regular rotation list for substitutes would have controlled which bus operators received those assignments. However, the absences of Mr. Vincent and Mr. Johnson were deemed by BOE to have created an emergency situation with respect to each of their bus runs.

The Supreme Court of Appeals of West Virginia has held that "[i]n general, the essential elements

of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action." Syl. pt. 3, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524, 525 (1989). This definition fits the circumstances confronting Mr. Scarberry on the afternoon of October 14, 2004. (See footnote 3)

The first priority of the school bus transportation system is to safely deliver students on time. This need must trump the seniority-based rotation system required under West Virginia Code section 18A-4-15 when an emergency arises. When confronted by the time constraints of obtaining bus operators for the afternoon runs in this case, the school board was required to utilize its broad discretion. "'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.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. pt. 2,*Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

Thompson has not alleged that the selection of the substitute drivers was an abuse of discretion or was arbitrary and capricious. Nor has she argued that it was not in the best interests of the school to call upon substitute bus operators who were available to ensure that students were transported in a timely manner. Rather, she alleged a violation of the seniority-based rotation system established pursuant to West Virginia Code section 18A-4- 15(b).

In other grievances involving emergencies, the failure to follow the otherwise appropriate rotation for making assignments has been excused. *Tate v. Monongalia County Bd. of Educ*., Docket No. 02-30-318D (Jan. 8, 2003)(failure to follow rotation for extra-duty assignments excused in an emergency), *Sizemore v. Monongalia County Bd. of Educ*., Docket No. 98-30-428 (Jan. 26, 1998). The foregoing cases dealt with extra-duty assignments. Under the policy in Monongalia County, normal extra-duty runs are assigned by seniority on a rotating basis. There is, however, an express provision that "'[e]mergency situations involving last minute bookings or a driver's cancellation shall be handled by the supervisor.'" *Sizemore v. Monongalia County Bd. of Educ.,* Docket No. 98-30-428 (Jan. 26, 1998).

The Monongalia County cases are significant in terms of recognizing that providing transportation to students is the overriding concern. When an emergency arises the school system must be afforded

the flexibility to take the appropriate steps to transport the students safely and on time. *See*, *Mooney v. Kanawha County Bd. of Educ*., Docket No.04-20-394 (March 28, 2005). Upon similar reasoning, due to the emergency nature of the assignments at issue in this grievance, the provisions of West Virginia Code section 18A-4- 15(b) did not control the selection of the substitute bus operators for Mr. Vincent's and Mr. Johnson's runs. Therefore, Thompson has failed to prove a violation of that statute. While it is unfortunate that Thompson missed the opportunity to take either of the emergency assignments, she has not met her burden of proof. Accordingly, this grievance must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. Because this is not a disciplinary grievance, Thompson bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code St. R. § 156-1- 4.21(2004); *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).

2 2. “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. The belated notice regarding the absence of Mr. Vincent, and the resulting need to obtain the services of a substitute bus operator, satisfy the definition of an emergency in that it was a situation that was “unforeseen or unanticipated” and “it call[ed] for immediate action.” Syl. pt. 3, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524, 525 (1989). This same analysis applies to the absence of Mr. Johnson.

4 4. An emergency can establish a legitimate basis for stepping outside of the normal rotation for assignments. *Tate v. Monongalia County Bd. of Educ*., Docket No. 02- 30-318D (Jan. 8, 2003)(failure to follow rotation for extra-duty assignments excused in an emergency), *Sizemore v. Monongalia County Bd. of Educ*., Docket No. 98-30-428 (Jan. 26, 1998). It was not necessary to assign Mr. Vincent's or Mr. Johnson's bus route in accordance with the seniority-based system of rotation because these were emergencies.

5 5. Thompson has failed to prove a violation of West Virginia Code section 18A- 4-15(b). Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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 West Virginia Code section 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.

Date:

September 1, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

For privacy's sake, telephone numbers have been redacted from the version of this exhibit admitted into the record.

Footnote: 2

It is not clear whether Dr. White's understanding of the meaning of the zero is correct.

Footnote: 3

The Transportation Supervisors testified at Level IV as to their practices in making emergency assignments. However, there was no testimony or documentary evidence to suggest that BOE has adopted a written policy to define an emergency or guide the Transportation Supervisors in such circumstances.