HARRY POLING,

Grievant,

v. Docket No. 04-47-361

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Harry Poling ("Grievant"), employed by the Tucker County Board of Education ("TCBE") as a bus operator, filed a level one grievance on August 27, 2004, in which he alleged violations of W. Va. Code §§ 18A-4-8b and 18-5-39, when he was not offered an extra-duty assignment on July 21, 2004. Grievant requests compensation for the additional 3 ½ hours he would have worked if given the assignment. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at levels two and three, and was advanced to level four on September 28, 2004. A level four hearing was conducted in the Grievance Board's Elkins office on November 19, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and TCBE was represented by Harry M. Rubenstein, of Kay Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before December 21, 2004.

The following facts have been derived from a preponderance of the evidence admitted during the evidentiary hearings conducted in this case.

Findings of Fact

1. Grievant has been regularly employed by TCBE as a bus operator at all times pertinent to this grievance. 2. In addition to his regular employment, Grievant has been employed by TCBE as a bus operator for the summer school program for approximately seven years.

3. Grievant was employed by TCBE during Summer 2004 from June 18 through July 31, 2004.

4. On July 21, 2004, Grievant worked from approximately 7:00-9:00 a.m. and from 12:30-

2:00 or 2:15 p.m., at his regular summer assignment.

5. Although Grievant's assignment required less than four hours time, bus operators are compensated for seven hours of work, regardless of the actual time worked.

6. A summer Bible camp requested a bus and driver to transport students to Fairmont, West Virginia, and back to Parsons, on July 21, 2004.

7. TCBE employed Sonny Carr, a substitute bus operator, for this assignment. Mr. Carr was paid for 8.25 hours.

8. During the regular school year, it is TCBE's practice to relieve a bus operator of his regular duty when he elects to accept a long-trip extra-duty assignment. If he misses only a morning or afternoon run, two and one-half hours are subtracted from the number of hours for which the employee is paid for the extra-duty assignment. If both portions of the regular run is missed, five hours is subtracted from the extra-duty assignment.

9. TCBE does not follow this practice during the summer due to difficulty in securing substitute bus operators.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 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). See W. Va. Code § 18-29-6.

Grievant argues that the assignment of extra-duty runs during the summer must be awarded in the same manner as during the regular school year. TCBE asserts the statutory provisions for assignment of these "long" trips are not applicable to summer employment, and that this trip is not the same as those subject to the rules and regulations of the regular school year.

W. Va. Code § 18-5-39(f) provides that persons employed during the summer "are entitled to all rights, privileges and benefits provided in sections five-b, eight, eight-a, ten and fourteen [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10, and 18A-4-14], article four, chapter eighteen-a of this code[.]" Grievant acknowledges that Section 8b is not referenced in Section

39(f), but asserts that by its own terms, it applies to all extra-duty assignments throughout the year, since no exception is made for those which occur during the summer.

W. Va. Code § 18-4-8b(f) discusses extra-duty assignment and states:

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 anaffirmative 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.

While the language of Section 8b is general, the terms of Section 39(f) specifically address summer employment, and expressly limit the benefits to which summer employees are entitled, and these do not include Section 8b. Because the specific language of Section 39(f) is controlling, the provisions of Section 8b do not apply to summer employment. Further, the Grievance Board has previously noted that State Board of Education Policy 4336, XII at A2 states, "[s]chedules for approved [extra] trips shall not interfere with the regular transportation schedule." Additionally, the Grievance Board has consistently held that "[i]mplicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board." Anderson v. Kanawha County Bd. of Educ., Docket No. 03-20-282 (Apr. 30, 2004); aff'd Kanawha County Circuit Court, Civil Action No. 04-AA-65 (June 4, 2004). See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995). McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (Apr. 18, 2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter

v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987); Russell v. Mason County Bd. of Educ., Docket No.03-26-028 (June 3, 2003), aff'd Kanawha County Cir. Ct. Civil Action No. 03-AA-95 (Jan. 13, 2004). Because the extra-duty assignment at issue lasted 8 ½ hours, Grievant was not "available to assume the duties of [the] position." Russell, supra.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 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). See W. Va. Code § 18-29-6.

2. Persons employed during the summer "are entitled to all rights, privileges and benefits provided in W. Va. Code §§ 18A-4-5b, 8, 8a, 10 and 14. W. Va. Code § 18- 5-39(f).

3. The provisions of W. Va. Code § 18A-4-8b are not included in the rights, privileges, and benefits granted to summer employees by W. Va. Code § 18-5-39(f).

4. State Board of Education Policy 4336, XII at A2 states, "[s]chedules for approved [extra] trips shall not interfere with the regular transportation schedule."

5. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board." Anderson v. Kanawha County Bd. of Educ., Docket No. 03-20-282 (Apr.30, 2004); aff'd Kanawha County Circuit Court, Civil Action No. 04-AA-65 (June 4, 2004). See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995).

6. Grievant was not available to accept the extra duty assignment on July 21, 2004.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Tucker 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.

JANUARY 24, 2005 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE