THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JUDY MAYNARD,

Grievant,

v. **Docket No. 06-50-137**

WAYNE COUNTY
BOARD OF EDUCATION,

Respondent,

and

TAMMY BORTEL,

Intervenor.

DECISION

Grievant, Judy Maynard, filed a grievance on January 6, 2006, against her employer, Wayne County Board of Education, alleging:
Violation of WV Code 18A-4-8b with regard to the non-posting of special education bus aide positions which pay overtime to aides at Buffalo Elementary school. Grievant resigned another paid position to do the run and was removed from the run and replaced. The run was never posted. Relief sought is to be returned to the run if the most qualified upon bidding and any compensation and benefits due.

Grievant was represented by Susan Hubbard of West Virginia Education Association, Respondent was represented by David Lycan, Esq., and Intervenor was represented by Gary Archer

of West Virginia Education Association. Grievant waived Level I. The grievance was denied at Level II. Level III was waived, and the grievance was appealed to Level IV where a hearing was held at the Grievance Board's Charleston office on June 14, 2006. This case became mature on July 14, 2006, upon submission by theparties of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts the special education bus aide position is an extracurricular position, and as such, it should have been posted. Respondent argues the position is posted as part of the special education aides' position. Also, Respondent asserts Intervenor is the most qualified for the position. (See footnote 1)

Based on a preponderance of evidence, I find the following facts have been established:

Findings of Fact

1. In October, 2005, Respondent posted the position of an Autism Mentor/Itinerate Transportation Classroom Special Education Aide for Buffalo Elementary as a result of an employee taking another position at another school. The posting explained Transportation Aides may be required to ride regular or special education buses. 2. No particular bus run was specified in any posting for Special Education Aides with transportation as a component.

3. Brenda Stevens received the Autism Mentor position, but was doing a different bus run than the one in question at that time.

4. Grievant is a Kindergarten aide at Buffalo Elementary.

5. When the bus run in question became available, Grievant spoke with Della Ryan, the Special Education Director, and offered to take that bus duty. Because it isdifficult to find people interested in accepting bus duty, Ms. Ryan accepted Grievant's offer. Up until Grievant received the position, a substitute aide had been assigned the bus run in question.

6. Grievant resigned from an after school tutoring position at a local community center to take the bus assignment.

7. Grievant began the bus assignment as an aide on October 25, 2005.

8. Overtime is paid to employees who work over 40 hours a week.

9. Grievant received 10 hours of overtime pay a week for the time she rode the bus.

10. Intervenor has been a Special Education Aide 14 years. Intervenor was originally given a different bus assignment than the one in question.

11. When Intervenor became aware Grievant was employed for the bus assignment in question, she spoke with Ms. Ryan and requested a transfer of bus runs because she wanted more overtime.

12. Ms. Ryan removed Grievant from the bus run and allowed Intervenor to transfer to the bus run in question. Grievant's last day on the bus was December 7, 2005. Intervenor began the bus assignment on December 8, 2006. (See footnote 2)

13. Intervenor had the requirement of serving as a transportation Aide in her job description as a Special Education Aide, but Grievant, as a Kindergarten Aide, did not.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims bya preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

The first issue to address is whether the bus assignment is an extracurricular position. (See footnote 3) *W. Va. Code* § 18A-4-16(1) defines extracurricular duties to mean:

any activities that occur at times other than regularly scheduled working hours, which include the instruction, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

The *Code* goes on to specify the "employee's contract of employment shall be separate from the extracurricular assignment." *W. Va. Code* § 18A-4-16(4).

The bus assignment is not extracurricular. The position was bid as an Autism Mentor/Itinerate Transportation Classroom Special Education Aide. As such, the bus assignment is part of the regularly scheduled working hours for anyone who is awarded this position. Whether the successful applicant wants to perform the bus duties is irrelevant because these duties are part of the position. Also, since the position was bid to include transportation, the contract for employment would encompass transportation as well.

Inherent in the posting for an Autism Mentor is that the successful applicant will remain with the autistic student during the bus assignments. However, it does not appear as if Respondent handles

the bus assignments in that fashion. This leads to muchconfusion. If Respondent is going to have the aide positions posted including transportation, then the aide should go with his/her student.

W. Va. Code § 18A-4-8b(g) states the board shall post and date notices of all job vacancies of established, existing or newly created positions. The position of Autism Mentor was posted to include transportation. However, if Respondent does not assign the bus route to go along with the child for which the aide is responsible, then any vacant transportation position should be posted.

Grievant requests that she be returned to the run if the most qualified. “Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. *W. Va. Code* §18A-4-8b.” *Leishman v. Monongalia County Bd. of Educ.*, Docket No. 04-30-127 (Aug. 31, 2004). *W. Va. Code* § 18A-4-8b(l) specifies that seniority of any service personnel shall be determined on the basis of the length of time the employee had been employed by the county board within a particular classification.

Grievant has been with the Wayne County Board of Education for 26 years. During that time, she worked as a Special Education Aide for 1 year. When she volunteered for the bus assignment she was classified as a Kindergarten Aide. By contrast, Intervenor has been employed by Respondent as a Special Education Aide/Itinerant Transportation Aide for 14 years. Clearly, Intervenor had more seniority than Grievant, and if the position had been posted and bid, between the two, Intervenor would have received the assignment.

It is unfortunate the Grievant resigned a tutoring position with a local community center and relied upon Respondent's assurances that she had the bus route. However, Grievant is not entitled to any compensation. Grievant should not have been given the bus assignment, even for a short time. She received overtime for performing the assignment,and therefore, no additional compensation is due.

The following conclusions of law support the discussion above.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. *W. Va. Code* § 18A-4-16(1) defines extracurricular duties to mean:

any activities that occur at times other than regularly scheduled working hours, which include the instruction, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled bases.

3. An "employee's contract of employment shall be separate from the extracurricular assignment." *W. Va. Code* § 18A-4-16(4).

3. *W. Va. Code* § 18A-4-8b(g) states that the board shall post and date notices of all job vacancies of established, existing or newly created positions.

4. “Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. *W. Va. Code* §18A-4-8b.” *Leishman v. Monongalia County Bd. of Educ.*, Docket No. 04-30-127 (Aug. 31, 2004).

5. *W. Va. Code* § 18A-4-8b(l) specifies that seniority of any service personnel shall be determined on the basis of the length of time the employee had been employedby the county board within a particular classification.

6. Grievant did not sustain her burden of proving she is the most qualified for the bus assignment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any such appeal must be filed within thirty 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.

DATE: September 29, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

At Level II Respondent argued that the grievance was barred by time. However, Respondent withdrew that argument at Level IV after getting clarification on when Grievant and her representative began addressing the issue.

Footnote: 2

There is no information concerning what occurred with the bus route Intervenor had been assigned.

Footnote: 3

Both parties agreed the bus assignment was extracurricular. However, after a review of the law, the undersigned believes this issue must be addressed.