THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOANNA COSTELLO,

Grievant,

v. **Docket No. 06-30-144**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Joanna Costello ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as an Aide, filed a level one grievance on January 5, 2006, in which she alleged that her salary had been docked for one-half day in violation of *W. Va. Code* §§ 18A-2-8 and 18-29-2. For relief, Grievant seeks the one-half day compensation, with interest. The grievance was denied at levels one and two. Grievant elected to by-pass level three, as is permitted by *W. Va. Code* § 18-29-4(e), and advanced an appeal to level four on May 5, 2006. (See footnote 1) A hearing was conducted in the Grievance Board's Westover office on August 17, 2006, to supplement the lower-level record. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association. MCBE was represented by Jason S. Long, Esq., of Kay Casto & Chaney, PLLC. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before August 31, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant has been employed by MCBE for approximately twenty-seven years, and has been classified as an Aide assigned to the Transportation Department at all times pertinent to this

grievance.

2. On October 27, 2005, Grievant learned that there would be no students riding the bus in the afternoon.

3. Grievant went home at approximately 1:30 p.m., after completing her mid-day assignment. She did not request annual or sick leave, or notify any administrator that she would be leaving.

4. When a run is unnecessary due to a lack of students, the bus operator and aide may be reassigned to another route or given other work, such as cleaning or paperwork, to complete during that time.

5. Michelle Marshall, the bus operator assigned to the run in question, did not leave work, but assisted in making another run on October 27, 2005.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance 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); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 18-29-6. *See also 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 preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant testified that she has always gone home on occasions when her run was cancelled, and that other employees had done so as well. Grievant argues that her action on October 27, 2005, was consistent with past practice, and there should be no penalty since she had not been advised of any change in the practice. Grievant further notes that MCBE suffered no economic loss due to her action, which she compares to school cancellation due to weather conditions, *i.e.,* employees do not work and are still paid. MCBE denies any past practice of paying an employee for an unexcused absence, and asserts that it cannot pay an employee for time not worked. MCBE distinguishes this situation from days schools are closed due to weather, for which payment is required by statute.

Grievant testified that while she had never been specifically told she could just go home if her run was cancelled, she and others had always done so. Grievant did not clarify how many times she has gone home in the past, and she did not offer the testimony of another employee to support her belief

that it was permissible to do so. MCBE administrators deny any past practice of paying an employee who leaves work on her own initiative.

There is no evidence that MCBE engaged in a past practice of allowing Transportation Department employees to simply go home, with pay, if a run was unnecessary on a given day. Therefore, Grievant was acting under a mistaken belief when she went home on October 27, 2005, and any other day she may have left work undersimilar circumstances. Although Grievant may have not engaged in willful neglect of duty, it would be improper for her to be compensated for time she did not work or request leave.

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 her grievance 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); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 18-29-6.

2. Grievant failed to prove the existence of a past practice by MCBE which would allow her to be paid for time she was not at work, or absent on approved leave.

3. Grievant is not entitled to compensation for one-half day on October 27, 2005.

Accordingly, the grievance is **DENIED.**

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

DATE: SEPTEMBER 18, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant did not pursue the alleged statutory violations at level four, stating only that the action had been taken contrary to past practice.