THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GILBERT CLARK,

Grievant,

v. **Docket No. 07-40-024**

Sue Keller

Senior Administrative Law Judge

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Gilbert Clark ("Grievant"), employed by the Putnam County Board of Education ("PCBE") as a bus operator, filed a level one grievance on October 2, 2006, in which he alleged Respondent violated *W. Va. Code* § 18A-4-8b by failing to post an extra duty assignment and merging that assignment, vocational special needs bus with the preschool run. Level I informal conference was held, however immediate supervisor defaulted by failing to make a proper and timely response. Informal Meeting was held on August 30, 2006. (See footnote 1)

For relief, Grievant requests that the assignment be posted and that the successful applicant receive all back pay and benefits. The grievance was denied at levels one and two. Grievant bypassed level three, and filed a level four appeal on January 29, 2007. Bruce W. Boston, WVEA Organizational Development Specialist, and Gregory W. Bailey, Esq. of Bowles Rice McDavid Graff & Love, LLP, agreed to submit the grievance for decision based upon the lower-level record. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed on or before March 26, 2007.

Synopsis

___Grievant argued that the transportation of a handicapped student from the Technical Center to Buffalo High School should have properly been posted and filled as a separate extra duty run. PCBE

asserts that it acted within its discretion when a bus operator completing a preschool run in that area was assigned to transport the student. Grievant failed to prove that PCBE violated the *W. Va. Code* § 18A-4-8b(g) requirement that a board post all job vacancies of existing or newly created positions.

The following facts have been derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Grievant has been employed by PCBE as a bus operator at all times pertinent to this grievance.

2. On or about August 29, 2006, Grievant was requested to provide transportation to a wheelchair bound student from the Putnam County Technical Center to Buffalo High School.

3. Transportation of the student was subsequently assigned to a bus operator completing an existing run in that area.

4. An assignment to transport the vocational student was never posted.

5. Grievant has never transported the student.

Discussion

Grievant argues that transportation of the Technical student was in fact a new and separate run. He supports this assertion by noting that the bus operator currently transporting the student must first deliver his preschool students to the Buffalo area and then return to the Technical Center to pick up this student. Since the transportation of thisstudent actually occurs after the driver has completed his preschool run, Grievant opines that it is a new assignment which was filled without having been posted. PCBE asserts that the bus operator drives past the Technical Center while completing his preschool route, and merely stops to collect the student. PCBE argues that it was not required to post a separate position when transportation of the student could be arranged by making a slight alteration to the run of a bus operator already in the area. PCBE additionally raised the issue of whether the grievance was timely filed in the proposed findings of fact and conclusions of law filed at level two. Because this issue was not asserted by the employer on behalf of the employer at or before the level two hearing, as is required by *W. Va. Code* § 19-29-3, it will not be considered.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); *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. "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).

"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 Bd. ofEduc.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986). The Grievance Board has held many times that the addition of a student to a run does not violate statutory provisions prohibiting changes to a service employee's daily schedule without their consent, nor does it constitute a new assignment. *See Napier v. Bd. of Educ.* 214 W. Va. 548, 591 S.E.2d 106 (2003); *Tayor v. Putnam County Bd. of Educ.* Docket No. 05-40-225 (Dec. 22, 2005).

The evidence has established that the change made to the preschool run was minor, and the driver did not object to the change in his schedule. Having determined that transportation could easily be arranged with existing resources, it would not have been prudent for PCBE to create a new assignment for a single student. Therefore, Grievant has failed to prove that the board of education was required to create a new assignment.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). *See W. Va. Code* § 18-29-6. "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).

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, thisdiscretion 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 Bd. of Educ.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986).

3. Grievant failed to prove that PCBE was required to create a separate extra duty assignment when the student could reasonably be transported by a driver on an existing route.

Accordingly, this grievance is **DENIED**.

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

DATE: APRIL 10, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant did not pursue the default issue at level four and it is deemed abandoned.