THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CARLA DELP,

Grievant,

v. **DOCKET NO. 06-27-219**

MERCER COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance on April 10, 2006, stating:

Grievant is employed by the Respondent as an aide at Mercer County Early Learning Center. (See footnote 1) She contends that her placement on the transfer list in order to add bus duties to the position she held in the 2005-2006 school year will jeopardize the safety and staff at her school by reducing the number of supervising staff in the morning. She contends that this action is arbitrary and capricious, not in the best interest of the school system and violates state board of education policy no. 2525.

Relief sought:

Grievants [sic] seeks reinstatement to the posisiton she held at Mercer County Early Learning Center for the 2006-2007 school year with the same daily schedule and duties she held in the 2005-2006 school year.

A level four hearing was held in the Grievance Board's Beckley office on September 20, 2006. Grievant was represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by John H. Shott, Esq. The matter became mature for decision on October 23, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of

law.

Synopsis

Grievant argues this grievance centers on her concern for the safety of the students at the Mercer County Early Learning Center. Grievant asserts having aides ride the bus instead of being at the school to supervise children as they arrive creates a safety concern.

Respondent avers the modification of staff scheduling was not arbitrary and capricious and does not compromise the health and safety of the students.

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

Findings of Fact

1. Grievant, Carla Delp, is employed by Respondent as an aide. Her assignment for the 2005-2006 school year was at the Mercer County Early Learning Center at its Bluefield site.

2. Prior to the end of the 2005-2006 school year, Respondent's Superintendent, Dr. Deborah Akers conducted a review of the special needs students being served by the school system.

3. Dr. Akers decided the special needs students would be better served if early learning centers were the ending point of the bus route. This would allow the aides to remain with the children until the last run in both the morning and the afternoon.

4. To implement this approach, Dr. Akers decided to repost two aide positions, add bus transportation duties to the postings. 5. Grievant's posted position did not have bus transportation duties as part of her job duties. Her position was one of the positions reposted to incorporate transportation duties.

6. Grievant was notified of the recommendation for her placement on the transfer list and requested a hearing.

7. A hearing was conducted by the Mercer County Board of Education on March 28, 2006, and the recommendation for transfer was approved.

8. The position was posted. Grievant could have bid on the posting, but did not because she was not interested in performing the transportation requirement.

9. During the 2005-2006 school year, teachers and aides were required to be in the building by 7:00 a.m., and the students who did not ride the buses could be dropped off as early as 7:15 a.m. The buses were scheduled to arrive between 7:45 and 8:00 a.m.

10. During the 2005-2006 school year, five adults worked in the cafeteria where children were supervised. Two aides worked in the rooms upstairs preparing materials for the day. One aide arrived on the bus with students.

11. Changes in the schedule were implemented for the 2006-2007 school year.

12. For the 2006-2007 school year, students could be dropped off starting at 7:45 a.m. Breakfast, which is used as instructional time, does not begin until after the last bus has arrived.

13. Five adults are available to supervise students during the 2006-2007 school year before the buses arrive, including four teachers and one aide. After all buses arrive, the total number of adults available is eight. 14. The enrollment at the Early Learning Center for the school year 2006-2007 is approximately 52-53 children, about one-half of whom are transported by bus.

15. A staff/child ratio of 1 to 10, at a minimum, must be maintained pursuant to 126 C.S.R. §§ 3.2 & 9.8 (West Virginia Board of Education Policy No. 2525) is met.

16. Grievant continues to be employed by Respondent, but at a different school.

Discussion

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 his 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 crux of this grievance is somewhat confusing. At Level III, Grievant testified as follows:

Q: Is it fair to say that you are not suggesting that the board or the administration failed to follow any particular statue or regulation or rule? You are not citing any specific statute, rule, or regulation the board has failed to follow in this grievance. Is that fair to say?

A: Well, with Policy 2525, the fact that it states one child for _ I mean one adult with ten children. Sometimes I wonder why is that policy. That policy is there to protect the children, and so I don't understand myself, personally, for what reason you have that, if you don't adhere to the policy. If you go over those limits, to me that's to protect them, to protect the children from being more than what you're supposed to care for.

Q: Is that the basis of your grievance, Ms. Delp?

A: Yes, it's in there.

Grievant has made it clear through her testimony that this grievance does not deal with seniority, nor does it allege Respondents failed to follow the transfer procedure set forth in *W. Va. Code* § 18A-2-7 which requires Respondent to provide Grievant with notice of the transfer and an opportunity for a hearing. Instead, Grievant appears to be arguing that by transferring her, Respondent violated policy with respect to staff/student ratios. This allegation does not show an injury in fact.

W. Va. Code § 18-29-2(a) defines “grievance” as:

"Grievance" means any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

The Grievance Board has held that a grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Division of Corr./Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994). There has been no testimony that Grievant was harmed economically or in any other way cognizable under the grievance statute.

Grievant argues the change that has occurred is arbitrary and capricious, not in the best interest of the school system, and in violation of the staffing regulations. These issueswill not be addressed in this decision because Grievant has failed to state a claim upon which relief may be granted.

The following conclusions of law support this discussion:

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 his 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* § 18-29-2(a) defines “grievance” as:

"Grievance" means any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

3. The Grievance Board has held that a grievant must show an injury-in- fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Division of Corr./Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

4. Grievant has failed to show an injury-in-fact, economic or otherwise. For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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: January 3, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant is no longer employed at the Mercer County Early Learning Center. She was transferred to another position within the same county.