THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ELAINE PRICKETT, et al.,

Grievants,

v. **Docket No. 06-30-326**

Sue Keller

Senior Administrative Law Judge

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Elaine Prickett, Elizabeth Snyder, Connie Carpenter, Vera Jones, Rhonda Owens, Loretta Hilling, and Jacqueline Mattern ("Grievants") employed by the Monongalia County Board of Education ("MCBE") as Bus Operators or Aides, filed a level one grievance on or about May 23, 2006, in which they alleged a violation of *W. Va. Code* § 18A-4-15, "rotating substitutes using reg. Drives as substitutes." For relief, Grievant seek proper implementation of the step-up procedure, and compensation for lost wages, plus interest. The grievance was denied at levels one and two. After mediation efforts failed, Grievants elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c), and advanced their appeal to level four on September 26, 2006. An evidentiary hearing was conducted in the Grievance Board's Westover office on February 5, 2007. Grievants were represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Jennifer S. Caradine, Esq., of Dinsmore & Shohl, LLP. The grievance became mature for decision upon receipt of MCBE's response to Grievant's proposed findings of fact and conclusions of law on March 8, 2007.

Synopsis

Grievants argue that MCBE has failed to properly implement the step up provision of *W. Va. Code* § 18A-4-15. Testimony of Transportation Supervisor Paul Christopher established that while some

confusion about the process had existed, the rotating seniority list was being used, although his documentation of the fact was lacking. MCBE does not use the seniority list in emergency situations, a valid exception. Grievants failed to prove they were denied any opportunity to step into another position, or that they were entitled to any lost compensation.

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

Findings of Fact

1. Grievants are currently employed in the MCBE Transportation Department and are classified as either Bus Operators or Aides.

2. MCBE maintains two regional bus garages, in Morgantown and Blacksville. The Morgantown area is much larger, and there are many more opportunities to step up than in the Blacksville area.

3. Initially, two seniority lists were maintained, and employees assigned to the Blacksville area were not allowed to step up to assignments in the Morgantown area. This practice was found to be contrary to *W. Va. Code* § 18A-4-15 in *Wolfe v. Monongalia County Board of Education*, Docket No. 05-30-412 (May 31, 2006).

4. Prior to May 23, 2006, Grievant Owens had never been given the opportunity to accept a step up assignment in the Morgantown area.

5. Grievant Prickett has accepted and declined offers to step up to other assignments.

6. MCBE now maintains one step up list, and follows the rotational schedule whenever possible, but does not always do so in cases of emergency.

7. Grievants did not identify any specific occasions on which they were denied the opportunity to step up to another position.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 CountyBd. 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants are seeking the proper implementation of *W. Va. Code* § 18A-4-15(b), which provides in pertinent part:

(b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence. For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.

Transportation Supervisor Paul Christopher testified at levels two and four that he had received a number of interpretations as to how the step up process should be implemented, and generally indicated some confusion as to what was to be done. Maintaining two seniority lists was addressed in *Wolfe, supra.* Grievants continue to be concerned that they are not being called on a rotating basis. This situation seems to have been corrected as Mr. Christopher testified that he does use the seniority list; however, it is evident that his record keeping needs improvement in this area. Mr. Christopher admitsthat he does not strictly follow the rotational list when he needs a bus operator on very short notice. Particularly, when a bus operator completes his or her regular run, but does not want to complete a mid-day run, it is difficult to locate coverage. This exception has been addressed in *Thompson v. Logan County Board of Education*, 05-23-068 (Sept. 1, 2005), which held that the normal rotation used for making substitute bus operator assignments does not have to be followed in an emergency situation.

Grievants also question MCBE's determination that a bus operator who is placed in an assignment out of order due to an emergency situation is entitled to retain the position until the

regular employee returns. This situation does not appear to have yet occurred, and would therefore be advisory in nature. The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory. *Drain v. Monongalia County Bd. of Educ.*, Docket No. 03-30-050 (May 27, 2003).

Finally, Grievants concede that it is impossible to calculate with mathematical certainty the extent of their financial injury, and suggest that they each be awarded $300, with MCBE given leave to prove that it owes less than that amount to each of them. This request is speculative, and contrary to the standard that Grievants must prove their claim by a preponderance of the evidence.

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, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rulesof 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. Grievants have failed to prove a violation of *W. Va. Code* § 18A-4-15, or that they are entitled to any compensation as a result thereof.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County 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: MARCH 20, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE