WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT LIPTRAP, RODNEY VANNOY,

STEPHEN RHODES, WILLIAM MATTHEWS,

and JILL HALSTEAD,

Grievants,

v.

Docket No. 07-40-315

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

___Robert Liptrap, Rodney Vannoy, (See footnote 1) William Matthews, Jill Halstead and Stephen Rhodes (jointly "Grievants") (See footnote 2) challenge the actions of the employer, Respondent Putnam County Board of Education (BOE), in adopting and applying its 1996 policy relating to the distribution of extra-duty assignments among bus operators. Grievants allege the BOE violated the law by not allowing them to participate in the rotation to receive extra-duty assignments and by allowing substitute bus operators to take extra-duty assignments. As relief, Grievant Liptrap seeks "[a]n additional half day of pay for each of the two days that I was not permitted to move up to full day status and pay for the extra runs I was denied." No specific relief was requested by the remaining Grievants.

___A Level One decision denying the grievance was issued on March 13, 2007. Thereafter, an appeal was filed at Level Two and a hearing was had before the Superintendent's designee, Harold "Chuck" Hatfield, on April 30, 2007. At Level Two, the Grievants appeared by and through their representatives, Gary Archer and Stephanie Thorn, with the West Virginia Education Association.

The BOE appeared by and through its counsel, Rebecca M. Tinder, Esquire, with the law firm of Bowles Rice McDavid Graff & Love, LLP. On June 1, 2007, the grievance was denied at Level Two.

The Grievants chose to by-pass Level Three and appealed directly to Level Four. (See footnote 3) They appear in this Level Four proceeding by and through their counsel, William B. McGinley, Esquire, with the West Virginia Education Association. The BOE, as in Level Two, appears by and through its counsel, Rebecca M. Tinder, Esquire. This matter became mature for decision on or about April 8, 2008.

Both parties have submitted proposed findings of fact and conclusions of law. The parties have agreed to submit the matter for decision based upon the record. This matter is now ripe for consideration.

Synopsis

Grievants aver that Putnam County Board of Education Policy T.3.8 (1996)(Policy T.3.8) violates West Virginia Code § 18A-4-8b and Article III § 10 of the West Virginia Constitution because the Policy does not allow regular, part-time bus operators to takeextra-duty bus runs. Further, in recognition of West Virginia Code § 18A-4-15, Grievants claim that the BOE erred when it permitted substitute bus operators to take extra-duty bus runs. Grievants generally seek an additional half-day of pay for each of the two days they were not permitted to take extra-duty assignments. Respondent BOE maintains that the Policy is not violative of West Virginia law and the BOE did not err in its promulgation or adherence to the Policy. Moreover, Respondent maintains that even if error exists, the Grievants still may not be awarded back-pay as they have not met the requisite quantum of proof for such an award. For the reasons set-forth below, the grievance is DENIED.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievants are employed by the BOE as regular, part-time bus operators. They are each assigned to afternoon runs that commence between approximately 2:00 p.m. and 2:45 p.m. and end between approximately 4:30 p.m. and 4:45 p.m.

2. Putnam County School buses operate in four geographic regions, which are designated, Winfield, Buffalo, Poca and Hurricane. Grievants are bus operators assigned in three of the four different regions.

3. On August 23, 1996, a two-thirds majority of the bus operators in Putnam County voted to adopt an alternative procedure ("alternative procedure") for assigning extra-duty bus runs, in accordance with the applicable provisions of West Virginia Code § 18A-4-8b.

4. On September 9, 1996, BOE voted to adopt the alternative procedure, as votedupon by the bus operators, for assigning extra-duty bus runs. (See footnote 4)

5. The alternative procedure for making extra-duty bus assignments was added to section T.3.8 ("Policy T.3.8") of BOE's "Transportation and Other Support Services" Policy.

6. Pursuant to Policy T.3.8, each geographical area maintains a "posting board" in the bus lounge. Bus operators in each area use the posting board to keep track of the extra-duty assignments for their geographic area. If a bus operator takes an extra-duty assignment, the hours required for the trip are reported on the posting board. The bus operator is said to be "charged" with those hours.

7. By the terms of the Policy, the assignments were not made in specific rotational order and the bus operators, including the Grievants, were not entitled to any run on any specified day until it was determined which operator had the least number of charged hours on each given day. New extra-duty assignments are given to the bus operator with the lowest number of hours on the posting board for the geographical region in question. A bus operator is "charged" hours not only for any extra-duty trip taken, but also for any extra- duty trip that is refused for other than a limited number of reasons identified in Policy T.3.8. For instance, bus operators are not "charged" with refusing an extra-duty assignment if it would interfere with a regular run or if it would fall during a holiday break.

8. Policy T.3.8 expressly provides that "[p]art-time drivers cannot accept and arenot charged for trips after a morning run or before an afternoon run." As a result, Grievants cannot take extra-duty runs prior to completion of their regular afternoon runs.

9. Policy T.3.8 expressly provided that "[a]ll special trips shall be operated by regular drivers or licensed substitutes." As a result, licensed substitute bus operators were eligible to take extra-duty runs.

10. On or about February 20, 2007, and February 21, 2007, extra-duty morning runs to take students to and from the Clay Center in Charleston, West Virginia, were offered to the bus operators whose names were on the posting boards for each of the geographic regions needing bus operators.

11. None of the Grievants' names were listed on the posting board for the Winfield region for the extra-duty assignments scheduled for February 20, 2007, and February 21, 2007. No evidence was

presented concerning the posting boards in the remaining geographic regions in which two of the Grievants were assigned.

12. Although Grievants claim substitute bus operators were assigned extra-duty runs to the Clay Center on February 20, 2007, or February 21, 2007, there is no evidence from which region those substitute bus operators' runs originated. Further, the Grievants have not submitted evidence concerning the nature of the substitute bus operators' selection and retention.

13. Grievants have not, at any stage in this proceeding, submitted evidence establishing that they would have received extra-duty assignment if their names were placed upon the “posting board” on February 20, 2007, and February 21, 2007.

Discussion

Policy T.3.8 (1996) violates the clear intent of the statutory scheme presented in West Virginia Code § 18A-4. The Grievants have presented no evidence as to the nature of the substitute bus operators' positions. Nor have the Grievents presented evidence to establish that they would have received extra-duty assignments had the intent of West Virginia Code §18A-4 been followed. It is not within the purview of this tribunal to assume or consider facts not in evidence.

In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W.Va. Code § 18-29-6. (See footnote 5) "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). Hence, this tribunal must consider the arguments raised by the Grievants within the context of the burden of proof.

This ALJ now considers the particular points of error raised by the Grievants.

Application and Promulgation Policy T.3.8

West Virginia Code §18A-4-8b, entitled *Seniority rights for school service personnel*, establishes the general framework for extra-duty assignments. West VirginiaCode §18A-4-8b(f) provides, in part, that

> [n]otwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner:
>
> (A) A service person with the greatest length of service time in a particular category of

> employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated.
>
> (B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

Hence, a particular classification category of employment may vote to adopt an alternative procedure for the distribution of extra-duty assignments and this alternative procedure is effective upon approval by the county board. Such is the situation in this grievance. On August 23, 1996, a two-thirds majority of the bus operators in Putnam County voted to adopt an alternative procedure for assigning extra-duty runs. Thereafter, on September 9, 1996, BOE voted to adopt an alternative procedure for assigning extra-duty bus runs.

The alternative procedure for making extra-duty bus trip assignments was added to section T.3.8 ("Policy T.3.8") of BOE's "Transportation and Other Support Services" policy. Policy T.3.8 provides, in part, that

> [d]rivers are not charged for trips which would interfere with their regular run. Drivers are not charged for missing trips when time has been incorrectly posted. *Part-time drivers cannot accept and are not charged for trips after a morning run or before an afternoon run*.

(Emphasis added). The linchpin of the Grievants' claim is that the Policy, as voted upon by the bus operators and passed by the county board, is in violation of the legislative intent. Specifically, the Grievants argue that the statute, *sub silentio*, does not permit the exclusion of certain groups from receiving extra-duty assignments. This tribunal has previouslyrejected an argument that distinguished between part-time and half-time bus operators in the context of Policy T.3.8. *See Chaney et al. v. Putnam County Board of Education*, Docket No. 05-50-075 (August 16, 2005). (See footnote 6) It now must determine whether Policy T.3.8 (1996) violates the intent of West Virginia Code §18A-4 by excluding certain employees from the rotational extra-duty list.

It has long been held that "[i]n ascertaining legislative intent, effect must be given to each part of a statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workermen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *See also State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) (recognizing the presumption that the Legislature intends "that every word used in a statute has a

specific purpose and meaning"). West Virginia Code §18A-4-8b(f) specifically provides that extra-duty assignments will be rotated between employees. It provides that those employees with the greatest seniority will go first, followed by those with less seniority, until all regular employees have had the opportunity to take part in extra-duty assignments.

The permissibility of bus operators' policy-decisions when voting under West Virginia Code § 18A-4-8b(f)(B) must be tempered by the legislative intent. Indeed, "[a]ny rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation." Syl. Pt. 3, in part, *Maikotter v. Univ. of West Virginia Board of Trustees/ WVU*, 206 W.Va. 691, 527 S.E.2d 802 (1999). Policy T.3.8 specifically excludes a group of employees that are recognized in the statutoryscheme. It cannot be said that a two-third vote of bus operators may act as super- legislatures and abandon the entire scheme established by our Legislature. Policies and rules promulgated under West Virginia Code §18A-4-8b(f)(B) must comply with the spirit of the statutory scheme.

There is emphatically no indication that the legislature intended to permit a group of similarly situated bus operators with a two-thirds majority vote to completely exclude a different group of bus operators from taking extra-duty runs. This postulate is clear when considering the directive that half-time employees and full-time employees shall be treated the same for the purposes of compensation for extra-duty assignments. *See* W.Va. Code § 18A-4-8a(j). Intuitively, our legislature intended that bus operators and the BOE would choose alternative policies that were congruent with sound management practices, not arbitrary exclusion. Insofar as Policy T.3.8 forbids Grievants from being placed upon the rotational list, it violates the statutory scheme. (See footnote 7) This particular portion of the Policy is void and unenforceable.

Substitutes

The Grievants claim that the BOE erred when it permitted substitutes to participate in extra-duty assignments. They direct this tribunal to its previous decision of *Bays v.Putnam County Board of Education*, Docket 95-40-096 (July 21, 1995). In *Bays*, a Putnam County bus operator alleged that the BOE illegally allowed substitute bus operators, who had been assigned to fill-in for regular bus operators, to accept extra-duty assignments in violation of West Virginia Code § 18A-4-8b.

When considering this issue, the *Bays'* ALJ looked to the particular circumstances under which substitutes were filling-in for the permanent, regular bus operators. Specifically, the *Bays* decision

examined whether the competitive bid procedure was used and whether there existed legal change in a substitute's status from short-term to long-term status. *See generally* W.Va. Code §18A-4-15(2); W.Va. Code §18A-4-8b.

In this grievance, the Grievants have presented no evidence that indicates the circumstance of the particular substitutes for which they grieve. There is no indication whether the substitutes were long-term or short-term substitutes, an imperative distinction in the *Bays* case. Insofar as portions of Policy T.3.8 permits short-term substitutes to take extra-duty runs, such portions must be found void and unenforceable in light of *Bays* and the jurisprudence therewith.

Relief

Upon review of the record in this action, it cannot be said that the Grievants are entitled to relief. No evidence has been presented to establish a proximate, causal- relationship between the alternative policy and payment for extra-duty assignments. There is no indication Grievants would have received the extra-duty assignment on February 20, 2007, and February 21, 2007, had their names been on the list. The Grievants are not entitled to back-pay.

In order for each of the Grievants to demonstrate entitlement to an extra-duty run orcompensation, it is necessary to establish he or she was "next in line." *Saddler v. Raleigh County Bd. of Educ.*, Docket No. 02-41-420 (Apr. 29, 2003). Grievants have not met their burden of proof.

The award of compensation for assignments which Grievants may have accepted, given prior-day notice is speculative, and “the Grievance Board does not render opinions which are speculative in nature.” *Pierson v. Ritchie County Bd. of Educ.*, Docket No. 98-43- 006 (May 29, 1998). "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Grievants have failed to establish that, had the proper rotation been followed, they would have received any of the extra-duty runs on February 20, 2007, and February 21, 2007.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

___1. Grievants bear the burden of proving the elements of this non-disciplinary grievance by a preponderance of evidence. W.Va. Code § 18-29-6.

2. “The generally accepted meaning of preponderance of the evidence is 'more likely than not.'” *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

3. Policies adopted pursuant to West Virginia Code §18A-4-8b(f)(B) must conform to the legislative intent of the statutes to which they relate.

4. Grievants have failed to establish that, had the proper rotation been followed, they would have received any of the extra-duty runs on February 20, 2007, and February21, 2007.

5. It is not the province of this tribunal to assume facts that were not presented into evidence. *See generally Board of Educ. of Mercer v. Townsend*, 207 W. Va. 285, 531 S.E.2d 664 (2000) (per curiam); *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993).

6. Grievants have failed to prove that they are entitled to any relief.

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 (repealed, *See footnote* 5*, supra)*. Neither the West Virginia Public 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 West Virginia 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: October 1, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

Throughout portions of the record in this matter, the Respondent has referred to this Grievent as "Rodney Varney." Upon review of the hand-written statement signed by this particular Grievent, it appears this Grievant's name is "Rodney Vannoy."

Footnote: 2

Grievants Jill Halstead, William Matthews, and Stephen Rhodes joined the grievance by signing a statement that requested they be added to Robert Liptrap's grievance and specifically complained that "[h]alf day drivers not allowed to take extra-duty runs during school hours while subs working on regular runs for drivers were allowed to take the extra-

duty runs." Grievant Rodney Vannoy signed a statement that simply read, "I Rod Vannoy, wish to be included in grievance filed on March 2, 2007 by Robert Liptrap."

Footnote: 3

Prior to jointly waiving the Level Four hearing, the parties submitted a Stipulated Level Four Exhibit. See footnote 4, infra. Thereafter, by letter dated September 16, 2008, this grievance was reassigned to the below-signed ALJ in an effort to ensure a more expedient decision.

Footnote: 4

Policy T.3.8, as amended on September 4, 2007, now permits part-time bus operators, such as the Grievants herein, to be awarded extra-duty assignments after the morning run and before the afternoon run. See Stipulated Level Four Ex. 1.

Footnote: 5

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W.Va. Code §§ 18-29-1 to 18-29-11 and W.Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W.Va. Code §§ 6C-2-1 to 6C-2-7 and W.Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W.Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W.Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 6

This ALJ, like the ALJ in Chaney, finds that the distinction between part-time and half-day is a matter of semantics and has no bearing upon the analysis of the issues presented.

Footnote: 7

In accordance with the principles of the West Virginia Supreme Court of Appeals, this ALJ declines to address the constitutional issue raised by the Grievants because it is unnecessary for the determination of this grievance. See Davis v. Mound View Health Care, Inc., 220 W. Va. 28, 640 S.E.2d 91 (2006) citing State v. Griffith, 168 W. Va. 718, 724, 285 S.E.2d 469, 473 (1981) ("It is a well settled principle that courts do not generally pass on the constitutionality of challenged statutes unless that question is necessary to the decision of the case."); Kolvek v. Napple, 158 W. Va. 568, 574, 212 S.E.2d 614, 618 (1975) ("Courts will not pass on the constitutionality of a statute unless it is absolutely necessary for the determination of the case").