WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHRIS GOODSON, ET AL.,

GRIEVANTS,

v.

DOCKET NO. 07-10-129

FAYETTE COUNTY BOARD OF EDUCATION,

RESPONDENT.

DECISION

Grievants in this matter, Chris Goodson, David Bays, Timmie Arrington, Dreama Carte, William Legg, Charles Skaggs, Vicki Jones, Sam Eads, David Haywood, William Kincaid, Jr., Randy Ingram, Judith Goodson and Nancy Holliday, filed this grievance on or about December 21, 2006, (See footnote 1) against Respondent Fayette County Board of Education ("BOE"). The Grievants maintain that Respondent "violated W.Va. Code 18A-4-16 & 18A- 4-8b in failing to post an extracurricular assignment and, instead, assigning two employees to assignment [*sic*]." As relief, Grievants seek "compensation for wages lost as a consequence of Respondent's actions with interest [*sic*]."

After the grievance was denied at Level One and Level Two, both parties agreed to waive Level Three and proceed directly to Level Four. A Level Four hearing was held on March 4, 2008, before Administrative Law Judge (ALJ) Thomas J. Gillooly. At the LevelFour hearing, Grievants appeared by and through their counsel, John Everett Roush with the West Virginia School Service Personnel Association. Respondent appeared by and through its counsel, Erwin L. Conrad. This matter was transferred to the undersigned ALJ due to administrative reasons.

This matter became mature for decision on or about March 18, 2008, the date proposed findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievants argue that Respondent BOE failed to properly post two assignments in the fall of 2006. They allege the Respondent BOE permitted two bus operators to build and move bus sheds (See footnote 2) without posting the assignments, as required by law. As relief, Grievants seek back-pay plus interest.

Respondent argues that the Grievants cannot establish that any Grievant would have been awarded an assignment if the assignments were posted.

The Respondent was not required to post the assignments. The Grievants cannot establish that they were within the particular category of employment to perform the assignments in question. Therefore, this grievance is denied.

After thorough review of the record, the undersigned ALJ makes the following.

Findings of Fact

1. Grievants are employed as bus operators by Respondent Fayette County Board of Education.

2. David Seay is the Director of the Respondent's transportation department. In November of 2006, Mr. Seay determined that more bus sheds were needed. He received daily telephone calls from the parents of students in the Ansted, West Virginia, area, complaining that young students were exposed to inclement weather while waiting for buses. The Fayette County Board of Education's maintenance department was not generally available to build bus sheds during the day.

3. From November 27, 2006, through December 8, 2006, Mr. Seay asked two bus operators to build and move bus sheds. These two employees, Charles Canterbury and Stephen Cody, had worked the summer of 2006 on the summer bus shed crew. (See footnote 3) They were asked to perform the assignments based upon their experience building bus sheds and their availability.

4. Mr. Canterbury and Mr. Cody, like the Grievants, are employed by the Respondent as bus operators.

5. The work of building bus sheds was performed during the middle of the work- day when most regular employees were working in their regular assignments.

6. Mr. Canterbury and Mr. Cody worked a total of thirty-two hours each during the two-week period referenced above. *See* Finding of Fact No. 3. They received thevocational hourly rate for the hours they spent building bus sheds, up to the point that their hours worked exceeded forty hours. To the point their hours worked exceeded forty hours, Mr. Canterbury and Mr. Cody received time and one-half of the vocational rate for hours worked.

7. The vocational rate is a flat hourly rate of $6.15, agreed to by bus operators and the board of education as the appropriate compensation for bus operators receiving extracurricular assignments.

8. The two assignments filled by Mr. Canterbury and Mr. Cody were not posted. 9. Work on the bus sheds was discontinued when a *maintenance* employee, Scott, (See footnote 4) filed a grievance.

10. Construction of the bus sheds involved primarily carpentry and general maintenance work for which there are three distinct classifications set forth in West Virginia Code § 18A-4-8, subsections 20, 21 and 43.

11. All of the Grievants held the classification of Bus Operator which is defined as “[p]ersonnel employed to operate school buses and other school transportation vehicles as provided by the State Board.” West Virginia Code § 18A-4-8(16).

Discussion

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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient thata 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).

To determine the proper procedure for selecting bus shed builders, it must be first determined whether the two assignments in question were extra-duty assignments or extracurricular assignments. (See footnote 5)

Extra-duty assignments are defined as “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.” West Virginia Code § 18A-4-8b (f)(1). In contrast, West Virginia Code § 18A-4-16(1) defines extracurricular assignments and provides, in part, that

> Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing,

> coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

I n this scenario the assignments were completed during regularly scheduled business hours, are not part of a bus operator's regular assignments and were irregular in nature. The assignments at issue were for a limited time and were to be completed in the early-afternoon. There was a finite amount of work. In consideration of the totality of the evidence presented, the assignments are extra-duty as they existed for a finite time for the completion of a finite amount of work. The procedure to be utilized for extra-duty assignments is provided in West Virginia Code § 18A-4-8b(f). West Virginia Code § 18A-4-8b(f)(2)(A) provides that

> 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. (See footnote 6)

(Emphasis added). As indicated by the plain language of the statute, West Virginia Code § 18A-4-8b(f)(2)(A) does not require the posting of extra-duty assignments. Insofar as the Grievants' claims are based upon these assignments being posted, this grievance must be denied.

Moreover, the Grievants have not established that they fit within a “particular category of employment” as required by West Virginia Code § 18A-4-8b(f)(2)(A). This grievance presents a unique factual scenario. None of the Grievants are within the “particular category of employment” that fits the assignment of which they grieve. Nor were the two individuals assigned to the extra-duty assignments within the “particular category of employment.” *Id*.

The nature of the assignments could generally be described as repairing and moving bus sheds. The nature of building and moving bus sheds does not involve worksimilar to the work performed by the grieving bus operators. No Grievant held the classification for Carpenter I, W. Va. Code § 18A-4-8(20), Carpenter II, W. Va. Code § 18A- 4-8(21), or General Maintenance, W. Va. Code § 18A-4-8(43). As indicated by the Respondent, it chose two bus operators to complete the assignments based upon their summer work experience and availability. The Grievants do not fit within the

"particular category of employment." This grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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. "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. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim[s] must be denied." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990). *See also Jennings v. Wyoming County Bd. of Educ.*, Docket No. 05-55-462 (May 18, 2006).

3. The bus shed assignments were extra-duty assignments.

4. West Virginia Code § 18A-4-8b(f)(2)(A) does not mandate that extra-duty assignments be posted.

5. Grievants are not within the "particular category of employment" to perform the task of building and moving bus sheds. West Virginia Code § 18A-4-8b(f)(2)(A).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. *See* footnote 1. 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: November 6, 2008

_____ **Mark Barney Administrative Law Judge**

Footnote: 1

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: 2

The parties use the term 'bus shed' to refer to the wooden enclosures that students stand in while waiting for the bus.

Footnote: 3

In 2006, there were three members of the summer bus shed crew, Charles Canterbury, Steven Cody, Grievant David Bays and Roger Hornsby, a custodian who had a full-day assignment and would not be available to build bus sheds mid-day.

Footnote: 4

This individual was merely referred to as 'Scott' throughout this proceeding. The nature of Scott's entitlement to a bus shed assignment was not developed in the record. The Respondent avers that it has settled the grievance with Scott.

Footnote: 5

Both parties analyze these assignments as extracurricular assignments. However, it is necessary to examine the nature of the work when determining whether the assignments are extra-duty or extracurricular.

Footnote: 6

West Virginia Code § 18A-4-8b (f)(b) provides "[a]n 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." There is no evidence that an alternative procedure was adopted in this case.