WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JUDY MULLINS,

Grievant,

v. **Docket No. 07-15-324**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Judy Mullins ("Grievant") initiated this grievance on April 19, 2007, alleging that Respondent's method of assigning extra bus runs violates "county transportation policy, past practice and WV Code 18A-4-16." She seeks as relief to be compensated for all trips she has missed due to these violations, and requests that the Board be required to comply with policy and law. The grievance was denied at all lower levels, and Grievant appealed to level four of the grievance procedure on June 15, 2007. Due to legislative changes affecting the grievance procedure and this agency, this matter was not scheduled for a level four hearing until January of 2008. At that time, the parties informed the undersigned that they wished to have this grievance decided on the record developed below, accompanied by findings of fact and conclusions of law. Although a deadline for submission of these proposals of January 30, 2008, was requested, Grievant did not submit them, and Respondent elected to rely upon the decision rendered at level two. (See footnote 1)

Synopsis

Grievant alleged that Respondent had improperly assigned extra bus runs and had failed to follow policies previously adopted by a driver "committee." Evidence established various problems did exist in Respondent's system of assigning bus runs. Although no alternative procedure had been voted upon by the drivers and adopted by the Board, as required by statute, the transportation department separated "educational" bus runs, such as field trips, from "extracurricular" runs, which they believed only included athletic events. Pursuant to applicable statutory provisions, extra-duty runs include all irregular and occasional assignments and would include both field trips and athletic events in one rotation list. In addition, the evidence established that, when a bus driver accepted an extra run and could not perform his or her regular duties, including extracurricular assignments, Respondent failed to implement the step-up provision, which requires that regular employees be allowed to substitute for the absent employee. Grievant's requested relief of compensation for missed trips was speculative and could not be granted. The grievance is partially granted and partially denied.

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

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("the Board") as a bus operator for approximately 18 years. 2. Many years ago, possibly in the early 1980's, a group of bus operators and transportation administrators formulated guidelines by which "extra" bus runs would be distributed among operators.

3. Pursuant to these guidelines, "curricular" trips were defined as including field trips, academic competitions, and all other "educational" runs, such as preschool and vo- tech. "Extracurricular" trips were defined as all trips associated with sporting events. There is a separate sign-up sheet for each of the two types of trips, and drivers are assigned to the runs according to a seniority-based rotation.

4. The guidelines referred to above have been incorporated into a policy manual for the transportation department, but they have never been voted upon by all of the bus operators or adopted as policy by the Board.

5. On the curricular trip list, Terri Nelson immediately precedes Grievant in seniority. Ms. Nelson has a supplemental contract for a vo-tech run that she performs every day.

6. Because vo-tech runs are considered to be curricular runs, when Ms. Nelson accepts a field

trip and cannot perform her vo-tech run, Grievant is then offered Ms. Nelson's vo-tech run as the next person on the curricular trip list.

7. Field trips often last longer than a vo-tech or preschool run, so bus operators who receive field trip assignments receive more money than those who only receive a vo- tech run in the curricular trip rotation.

8. In the early 1990's, a driver “committee” was formed in order to resolve disputes with the administration. This committee generated a document entitled “Subject: Trip Sheet,” which discussed how curricular and extracurricular bus runs (as definedabove) would be assigned. This document indicated that there would be a separate sign- up sheet for “auxillary and vo-tech runs,” which would be assigned to regular drivers according to seniority, before being offered to substitutes.

9. The “Trip Sheet” document was not voted upon by all of the bus operators and has not been adopted as policy by the Board.

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. (See footnote 2) "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).

Grievant contends that, pursuant to the “Trip Sheet” memo that was formulated some time in the early 1990's, there should be a separate rotation list for vo-tech, preschool and other auxillary runs, and they should not be included on the curricular trip list. Therefore, if this system were used, Grievant would not have to “use up” her turn on the curricular trip list each time Ms. Nelson accepts a trip and cannot perform her supplemental vo-tech run. Respondent contends that it followed the guidelines utilized bythe transportation department with regard to curricular and extracurricular trips, noting that the recommendations of the driver “committee” have never been adopted by the Board.

The instant case presents an interesting situation, in that both parties are incorrect in their interpretation of applicable law and policy. The facts presented here implicate statutory provisions regarding extracurricular assignments, extra-duty assignments, and the so-called “step up” provision, none of which have been correctly cited, if at all, by the parties to this grievance. Therefore, a

discussion of the definitions and distinctions between the various types of assignments appears to be necessary.

West Virginia Code § 18A-4-8b defines extra-duty assignments as “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.” The statute further provides that such assignments shall be made on the basis of seniority on a rotating basis, unless the employees within that particular job classification have voted upon an alternative procedure. Although both parties, from different viewpoints, have argued that the “curricular” and “extracurricular” definitions used as guidelines by the Hancock County transportation department govern here, this would obviously have required the adoption of an alternative procedure under the requirements of this statute. In that regard, the statute requires that the alternative procedure be “approved by both by the county board and by an affirmative vote of two thirds of the employees within that classification.” It is undisputed that neither happened in this case.

Thus, contrary to the system used by Hancock County, field trips and athletic events would both be considered “extra-duty” trips. These runs constitute the “occasional” type of assignment contemplated by § 18A-4-8b, and both should be included in a list ofruns to be assigned pursuant to a seniority-based rotation. *See Prickett v. Monongalia County Bd. of Educ.*, Docket No. 02-30-242D (Jan. 13, 2003). Since no alternative procedure has actually been voted upon and adopted as required by statute, Respondent's use of two separate lists for “educational” and “athletic” trips is blatantly contrary to the applicable law.

As to vo-tech runs, such as the one performed by Ms. Nelson pursuant to a supplemental contract, this type of run is legally considered to be “extracurricular.” West Virginia Code § 18A-4-16 defines extracurricular assignments as “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.” Further, the statute provides that such assignments “shall be made only by mutual agreement of the employee and the superintendent” and the agreement must be contained in a contract separate from the employee's regular employment contract. In the absence of an alternative method for making such assignments, boards of education must select applicants for extracurricular assignments on the basis of seniority, qualifications, and past evaluations, pursuant to W. Va. Code § 18A-4-8b.

Because the evidence indicates that Ms. Nelson held a supplemental contract for the vo-tech run

she performs, it would appear that this portion of her duties is an extracurricular assignment which has been assigned pursuant to the provisions of § 18A-4-16. Once again, the evidence does not establish that any alternative method for assigning extracurricular bus runs has been officially adopted. It must be assumed thatRespondent has assigned such runs pursuant to § 18A-4-8b, which would be the required method in the absence of a voted-upon and adopted alternative procedure.

Based upon the minimal evidence of record, it appears that, when Ms. Nelson accepts a curricular run, such as a field trip, this causes her to be absent from her extracurricular assignment (and potentially her regular bus run) on that particular day. In turn, a driver is needed to perform her usual assignment, and Respondent goes to the curricular rotation list and offers it to the next person in line, which is usually Grievant. This method also is clearly in violation of applicable law, in that the extracurricular run is not being “assigned” (it is assigned by contract to Ms. Nelson), but an absence has been created by the regular driver, which must be filled by another driver. Respondent's use of the curricular trip list under these circumstances is improper, because that list should only be used for the assignment of extra-duty trips, as discussed above.

West Virginia Code § 18A-4-15(b) provides in pertinent part:

> 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 [§ 8A-4-8(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 work 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 employedschool bus operators are considered to be employed within the same building or working station.**

(Emphasis added). Pursuant to this statute, when a regular bus operator is absent for all or a portion of his or her workday, the so-called “step-up” provision is implicated, requiring that other drivers be offered the opportunity to substitute, on a rotating and seniority basis. *See Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 06-30-326 (March 20, 2007).

Based upon the evidence of record, Respondent's method of assigning such bus runs contravenes the applicable statute. Rather than consulting the seniority-based rotation list for extra-duty trips, when a regular driver will be absent, it is required to offer the position to regular drivers, based upon seniority, without requiring them to sacrifice their position on the extra-duty list.

As relief in this grievance, Grievant has requested to be compensated “for all trips she has missed” as a result of Respondent's improper methods for assigning the various types of bus runs. However, as discussed above, both the curricular and extracurricular lists used by Respondent were improper, and it has not used the step-up provision when regular drivers are absent because of extra-duty trips. Therefore, even if Grievant had provided a list of recent trips that had been offered to drivers, it would be virtually impossible to determine who would have or should have received the various trips and runs, if they had been divided and offered according to the applicable provisions governing extracurricular, extra-duty, and step-up assignments. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338(Jan. 20, 2006); *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Richards v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 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); *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

Accordingly, although there are obvious improprieties in Respondent's system for assigning extra bus runs, which unquestionably need correcting, no other specific relief may be granted. The following conclusions of law are appropriate in this matter.

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.

2. “Extra-duty” jobs are “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.” *See* W. Va. Code § 18A-4-8b(f); *McBride v. Summers County Bd. of Educ.*, Docket No. 01-45-614 (Aug. 20, 2002).

3. Absent an alternative procedure which has been voted upon and approved by two-thirds of the bus operators and adopted by the county board of education, extra- duty trips are to be assigned on a seniority-based rotation. *See* W. Va. Code § 18A-4-8b*; Prickett v. Monongalia County Bd. of Educ.*, Docket No. 02-30-242D (Jan. 13, 2003). 4. West Virginia Code § 18A-4-16 defines extracurricular assignments as "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."

5. Pursuant to the provisions of West Virginia Code § 18A-4-15(b), bus operators are to be given the opportunity to "step up" into the position of another absent regular bus operator, on a rotating and seniority basis. *Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006).

6. Grievant has proven by a preponderance of the evidence that Respondent has improperly assigned extra-duty trips and has improperly implemented the step-up provision when regular bus operators are absent.

7. "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); *See Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. Grievant's request for compensation for missed trips is denied due to its speculative nature. Respondent is hereby **ORDERED** to observe the applicable statutory provisions when assigning extra-duty trips and filling the temporary absences of regular employees, in accordance with this Decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County. Any such appeal must be filed within thirty (30) days ofreceipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, 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 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: February 29, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, William T. Fahey.

Footnote: 2

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.