WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MILTON HORTON
Grievant,

v. **Docket No. 2011-0466-McDED**

McDOWELL COUNTY BOARD OF EDUCATION
and WV DEPARTMENT OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Milton Horton, filed a grievance against the McDowell County Board of Education ("MCBE"), Respondent, on August 20, 2010. The Statement of Grievance essentially provides that extra work was offered to a substitute bus operator instead of a regular employee bus operator. Grievant claims, based on seniority, he should have been offered the job. Grievant alleges a violation of W. VA. CODE §§ 18A-4-8b and 18-5-39, seeking compensation for lost wages (10 days) with interest.[1] The West Virginia Department of Education (DOE) is recognized as a Respondent party.[2]

A conference was held at level one. James G. Brown, Superintendent and Chief Administrator of Respondent MCBE, conducted the level one conference on September 7, 2010. A written decision was issued at that level on October 5, 2010 determining a

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[1] Grievant's level three Statement of Grievance additionally cites W. VA. CODE § 18A-4-15.

[2] The West Virginia State Board of Education (WVBE) voted to intervene into the operation of McDowell County Schools pursuant to the authority conferred upon it by WEST VIRGINIA CODE § 18-2E-5. At all times relevant to this grievance, MCBE is operating under the auspice of State intervention and applicable governing rules and regulations.

violation occurred granting the grievance, but did not provide Grievant with a monetary award.[3] Grievant appealed to level two on October 15, 2010, and a mediation session was held on February 11, 2011. Grievant appealed to level three on February 18, 2011.

A level three hearing was held before the undersigned Administrative Law Judge on June 28, 2011, in the Grievance Board's Beckley hearing facilities. Grievant appeared in person and was represented by John Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent MCBE was represented by Howard E. Seufer, Jr., Esquire of Bowles, Rice, McDavid, Graff & Love, LLP. General Counsel for the WV Department of Education was identified as Heather L. Deskins, Esquire. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law document on or about July 28, 2011. Grievant and Respondent MCBE submitted fact/law proposals.

Synopsis

Substitute bus operators were utilized to perform the duties of identified "activity runs" from August 2 through August 13, 2010. Grievant, a regularly employed bus operator of the McDowell County School system, grieves for alleged lost wages. If the duty had been properly made available to regular bus operators on the basis of seniority, there were several other regular bus operators with greater seniority rights than Grievant who were

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[3] The date of the level one decision is not an issue in dispute. Nevertheless, this Administrative Law Judge notes a copy of the decision with the heading of *"LEVEL I"* with a Certificate of Service indicating an October 5, 2010 issuance date and a subsequent copy of the decision is entitled "LEVEL I - *Revised October 18, 2010."* The only difference detected other than the aforementioned header, is one word of the first line of page 2. "During the weeks of August 2-13, 2010 (Monday - *Thursday*)" adjusted to "During the weeks of August 2-13, 2010 (Monday - *Friday)*." Emphasis added. G. Ex. 5.

also eligible to perform an activity run. Respondent MCBE acknowledged that errror(s) transpired regarding the administrative processing of the identified bus runs. The Level One Decision determining a violation of applicable West Virginia Code occurred, granted the grievance, but did not award Grievant any monetary relief.

Grievant did not establish by a preponderance of the evidence that a sufficient number of the more senior regular bus operators would have declined an available activity run and thus made a run available to Grievant. This Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a bus operator of the McDowell County School system.

2. Grievant is seventh or eighth on the county regular seniority bus operator list.[4] At the time relevant to this grievance, there were seven regular bus operators with greater seniority rights than Grievant. These bus operators in order of seniority were identified as:

1. Ballard Kirk II
2. Terry Earls
3. Sherry Kirk* (see footnote below)
4. Catherine Dotson
5. Wilburn Rose
6. Audrey Blevin
7. Alice Jones

[4] Slight variation is recognized in the seniority list as presented, G. Ex. 1, parties concur regarding this fact. Sherry Kirk is not listed on G. Ex.1 but is recognized as a bus operator with more seniority than Grievant. Minor deviation credited to omission, transfer, source and/or date of criteria list.

3. Before 2010, MCBE employed bus operators, four nights a week, during the regular instructional year to take students home in the evening following after-school activities. As a result of consolidation, MCBE made changes in "Activity Runs" for the 2010-2011 school year.

4. Respondent decided to provide transportation services to students participating in extracurricular activities not only after school began, but also prior to school beginning. This commenced a couple of weeks before the regular employment term for bus operators began, and before classes started for students. In previous years, service was not provided until school began for students.

5. Upon the start of extra-curricular activities in the month of August, a need to provide transportation for students was identified and the provision of activity buses was initiated.

6. MCBE posted three extracurricular assignments at a rate identified as $24 per evening bus run. The posting numbers were SEC-11-01, SEC-11-02 and SEC-11-03 (G. Exs. 3 & 4).

7. Two after school activity bus positions were posted on August 3, 2010 and then a third on August 5, 2010.[5] Originally, two of these positions became vacant due to a reduction in force effective for the 2010-2011 school year as a result of a consolidation of two high schools. The consolidation left the status of need undetermined and the positions were eliminated. The third position was newly created

[5]On August 3, 2010, two extracurricular evening activity runs were posted. One was for the Iaeger area of the county, the other for the War area. On August 5, another extracurricular evening activity run was posted for the Welch area.

based on an increased number of students requiring transportation for after school activities. (L-1 Decision).

8. Substitutes were utilized to perform the duties of at least two of these assignments.

9. For the period of August 2 – 13, 2010, which included the posting periods and the time it took to select the successful bidders, all three activity runs were made by bus operators from the County Board's substitute list. Instead of being paid $24 per day, the bus operators were paid their daily substitute rate. They worked more than 3.5 hours per day making the activity runs and the substitutes were paid full-day wages.

10. MCBE Superintendent James Brown acknowledged that a mistake had been made. In his Level One decision, he agreed that the activity runs for the period of August 2-13 (before the regular employment term for bus operators began) should have been posted as summer service personnel jobs rather than extracurricular assignments. He further acknowledged that if substitute bus operators were needed to make the activity runs during the posting period and until the positions were filled, W. Va. Code § 18-5-39 required that the substitutes be drawn on a seniority basis from the ranks of the regular bus operators who were not then performing bus operator duties.

11. The Level One Decision determined a violation occurred, granted the grievance but did not award Grievant the relief he desired. The decision concluded and specifically stated:

> Viewing the portion of the duties that occurred before the first day of school as a summer service position for which a substitute was needed until one of the applicants was appointed; it is true, that the summer

> substitute list consists of all those regular-year bus operators who are not working in summer positions. At the time of the duties performed Mr. Milton Horton was not working in a summer position, he, like other regular-year bus operators who held no summer positions, would be on that summer substitute list. As the seventh most senior bus operator in the district, Mr. Horton would not have first refusal of the work and for the purpose of this grievance one would usurp that he was not denied an opportunity for employment to substitute in the posted vacancy. For the record, four more senior bus operators were not employed for summer work during August 2-13, 2010 and would have first refusal.
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> The Grievant claims violations of West Virginia Code 18A-4-8B and 18-5-39. As a violation occurred, this grievance is granted. The Grievant seeks to be compensated for employment. Whereas, it is undeterminable if the position would have been filled by a more senior bus operator, Mr. Horton is not granted compensation as sought.

October 8, 2011 Level I Decision and Revised L-1 Decision (G. Ex. 5).

12. Superintendent Brown acknowledged that the activity run should have been offered to regular bus operators on the basis of seniority. However, he also concluded that Grievant failed to prove that more senior regular bus operators would have declined the activity run and thus made the run available to Grievant.

13. Ballard Kirk, who was the most senior of the Board's regular bus operators, made it clear to Respondent that if he had been offered the three runs, he would have accepted the one in the War area. Bus Operator Kirk's 2010-2011 regular employment term had not yet begun and he was not, at the time in discussion, working for the Board as a summer bus operator.

14. Ballard Kirk is a more senior bus operator than Grievant. He grieved the filling of the activity runs and was awarded compensation for the assignment.

15. Of the seven bus operators ahead of Grievant on the seniority list, it was established that at least four of the more senior bus operators (other than Ballard Kirk)

were not working for the Board as summer bus operators during the period of August 2 – 13, 2010. Nor had their 2010-2011 regular employment terms yet begun.

16. Sherry Kirk and Terry Earls are more senior than Grievant. Neither filed a grievance concerning the filling of the activity runs by substitutes.

17. Wilburn Rose, who was more senior than Grievant as a McDowell County bus operator died shortly before the level III hearing.[6] No swore testimony by Mr. Rose was available at the June 28, 2011 hearing.

18. Further, with regard to the following regular bus operators who are more senior bus operators than Grievant, it was established that:

i. Catherine Dotson would have been interested only in the lager job and not the Welch job sought by Grievant.
ii. Audrey Blevins retired before August 2009.
iii. Alice Jones broke her ankle in July 2010 and was unable to work from that point through November 2010.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard

[6] This bus operator was not deceased at the time relevant to the activity runs in discussion.

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Prior to McDowell County 2010-2011 school year beginning, a need to provide transportation for students was identified and the provision of activity buses was initiated. Substitutes were utilized to perform the duties. For the period of August 2 – 13, 2010, which included the posting periods and the time it took to select the successful bidders, three activity runs were made by bus operators from the County Board's substitute list. Later this action was determined to be improper and a violation of applicable West Virginia Code.[7] *E.g., see* Level One Decision. As a regular bus operator of the McDowell County School system, Grievant contends lost wages and seeks a monetary award as relief. In order to determine the validity of Grievant's claim, it is necessary to attempt to ascertain which bus operators may or may not have accepted or declined the identified activity runs, if they had been offered in the proper rotation. *See* Finding of Fact 2, *supra*, for seniority list. The sole issue is whether Grievant would have had the opportunity to receive one of the activity runs had it been properly offered to regular bus operators.

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[7] It is agreed that the activity runs for the period of August 2-13 (before the regular employment term for bus operators began) should have been posted as summer service personnel jobs rather than extracurricular assignments. Superintendent Brown further acknowledged (and agreed) that if substitute bus operators were needed to make the activity runs during the posting period and until the positions were filled, W. Va. Code § 18-5-39 required that the substitutes be drawn on a seniority basis from the ranks of the regular bus operators who were not then performing bus operator duties and whose employment term for the coming school year had not yet begun.

Under W. VA. CODE § 18-5-39, "When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis." W. VA. CODE § 18A-4-8b(f) requires that certain assignments also be offered to employees in the applicable classification pursuant to a seniority-based rotation. "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.'" *See White et al. v. Monongalia County Bd. of Educ.,* Docket No. 2008-0586-CONS (Dec. 16, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.,* Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997).

MCBE posted three activity run assignments. Bus Operator Ballard Kirk II, who is the most senior bus operator of the McDowell County School system, grieved events and was awarded compensation.[8] Thus, there are two other such assignments to be

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[8] Respondent MCBE acknowledged that Ballard Kirk II, who was the most senior of Respondent's regular bus operators, should have been offered one of the opportunities to make an activity run from August 2 – 13, 2010. Bus operator Kirk's 2010-2011 regular employment term had not yet begun, he was not at the time working for the Board as a summer bus operator, and he made it clear that if offered the three runs, he would have accepted the one in the War area. The parties agreed that Mr. Kirk would have taken the War area assignment, if offered, and thus was properly granted monetary relief.

considered.[9] Grievant, who bears the burden of proof, must establish that he was "next in line" for one of the only two summer assignments in question: the Iaeger area run and the Welch area run.

With regard to the other bus operators that were more senior than Grievant,[10] it was established that Audrey Blevins had retired prior to August 2009 and that Alice Jones was injured and unavailable. (Uncontested fact.) It is established that Catherine Dotson was not interested in the Welch assignment. Grievant establishes this as fact with the undisputed testimony of bus operator Dotson. Ms. Dotson would have accepted the Iaeger area job. (Level 3 testimony of Catherine Dotson).

Thus, there is only one activity run to which Grievant could possibly lay claim. Exactly whether or not Wilburn Rose would have accepted this assignment is of concern. Yet, due to operator Rose's death prior to the level three hearing, it is impossible to ascertain this information by his direct testimony.[11] Grievant suggests the actions of Mr. Rose can be discerned. Bus Operator Dotson testified as to the general pattern of conduct demonstrated by Rose toward extra assignments. Grievant maintains that Mr. Rose would have declined the run. Given the limited information made available on this issue, the undersigned is hesitant to divine the actions of

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[9] If the remaining assignments (for the Iaeger and Welch areas) had been filled as required by W. Va. Code § 18-5-39, the more senior regular bus operators would have been entitled, on a seniority basis, to be offered both of the runs before any offer was made to Grievant.

[10] (1) Ballard Kirk II (2) Terry Earls (3) Sherry Kirk (4) Catherine Dotson (5) Wilburn Rose (6) Audrey Blevin and (7) Alice Jones.

[11] Wilburn Rose died on June 9, 2011, just prior to the Level Three hearing.

deceased bus operator Rose, but will accept as a working premise that it is more likely than not that he would not have stood as the hindrance separating the instant Grievant from the Welch activity run. Noting a demonstrated disinclination to take extra work in the last few years of his career makes it "more likely than not" that bus operator Rose would not have sought or accepted the Welch activity run.

This leaves Sherry Kirk and Terry Earls as unaccounted factors. Pursuant to the evidence of record and agreement of the parties, if the Welch activity run had been properly presented for consideration to regular bus operators, Sherry Kirk and Terry Earls were entitled to accept or decline the assignment prior to the opportunity being made available to Grievant. Neither filed a grievance over the subject matter of the present grievance. Grievant contends this omission should act as a waiver of any preference that they might have held over Grievant, citing *Daniels v. Mingo County Board of Education*, Docket No. 90-29-329 (Oct. 31, 1990).[12] The undersigned is not persuaded. Not pursing a protracted legal action after an event of opportunity has passed is not synonymous with declining a meritorious opportunity timely presented. Sherry Kirk was not called as a witness. In fact, no evidence was offered to show that she would have accepted or declined, if offered, the Welch area assignment. Mr. Earls failed to honor the subpoena to appear at the level III hearing. All in all, it is not established to be "more likely than not" that both of these two more senior regular bus operators would have declined this wage earning opportunity. This administrative law judge finds that either one of these more senior bus operators may have chosen to accept the last activity run in discussion.

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[12]*Daniels v. Mingo County Board of Education,* Docket No. 90-29-329 (Oct. 31. 1990) reversed by Mingo Circuit Court, Civil Action 90-C-8358, April 16, 1992.

In cases similar to the instant one, it was held that although a grievant has demonstrated a violation of W. Va. Code § 18-5-39, and Respondent agrees this was the case, there is not sufficient evidence to establish Grievant should receive what, in essence, would be a windfall by paying for work the grievant did not perform. *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003); *White, et al., v. Monongalia County Board of Education*, Docket No. 2008-0586-CONS (Dec. 16, 2008).

In summation, if the MCBE had followed the correct procedure in selecting summer service substitutes, it is undisputed that the War area assignment would have been accepted by the most senior regular bus operator, Ballard Kirk. It is also agreed that the remaining two assignments (in the Iaeger and Welch areas) would have then been offered, in descending seniority order, to several other regular bus operators before an offer could have been made to Grievant. One of the more senior bus operators was Catherine Dotson, who would have accepted the Iaeger job. Of the remaining more senior regular bus operators, Grievant failed to prove that two of the others, Terry Earls and Sherry Kirk, would have declined the Welch area assignment, and thus Grievant failed to show that he would have been offered any of the assignments. When the relief sought by a grievant is speculative or otherwise legally insufficient, the claim must be denied. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998). Accordingly, Grievant is not awarded the relief requested in the instant matter.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. Under W. VA. CODE § 18-5-39, "When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis."

3. "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.'" *See White et al., v. Monongalia County Bd. of Educ.,* Docket No. 2008-0586-CONS (Dec. 16, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.,* Docket No. 05-30-338 (Jan. 20, 2006); *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. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997).

4. Although it was established and recognized that Respondent failed to follow applicable statutory procedures for properly awarding identified activity runs, Grievant has failed to establish that, had the assignments been properly offered to regular bus operators, in descending seniority order, he would have received any of the identified activity runs. *See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003); *White et al., v. Monongalia County Board of Education*, Docket No. 2008-0586-CONS (Dec. 16, 2008).

5. "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).

6. The monetary relief sought by Grievant is speculative. Grievant did not establish by a preponderance of the evidence that he is entitled to lost wages stemming from the activity run assignments of discussion in this grievance matter.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 16, 2011

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Landon R. Brown
Administrative Law Judge