THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRI LYNN HONAKER,
Grievant,

v. **Docket No. 2010-0533-GreED**

GREENBRIER COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

On October 28, 2009, Grievant, Sherri Lynn Honaker, filed a grievance against Respondent asserting that she was "deprived of the opportunity to make extra duty assignments" on October 24 and 31, 2009.[1] As relief, Grievant seeks "compensation for lost wages with interest". Grievant waived timeliness and agreed to schedule the level one hearing for December 9, 2009. The grievance was denied at that level. A level two mediation was conducted on May 17, 2010. A level three hearing was held before Administrative Law Judge Wendy Elswick[2] on February 14, 2011, at the Grievance Board's office in Charleston, West Virginia.[3] Grievant was represented by John Everett Roush,

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[1]The grievance form states the dates of alleged missed extra duty assignments as October 24 and 30, 2009. This was a simple mistake. Grievant intended the dates of October 24 and 31, 2009.

[2]For administrative purposes, this case was reassigned to the undersigned on September 20, 2011.

[3]Grievant argues that the automated calling system has made errors in addition to the two instances on her original grievance form and seeks compensation for lost wages with interest for any additional missed extra-duty assignments. All of the allegedly additional missed opportunities occurred before Grievant filed her grievance on October

Esq., West Virginia School Service Personnel Association. Respondent was represented by Erwin L. Conrad, Conrad & Conrad, Attorneys at Law.

Synopsis

Grievant asserts that Respondent's automated calling system implemented in the 2009 school year is in violation of W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i. Grievant argues that she was erroneously skipped over on the call list for trips performed on October 24 and 31, 2009. Respondent asserts that the automated call system correctly contacted eligible bus operators based on seniority on a rotating basis.

Grievant failed to prove by a preponderance of the evidence that the automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for an extra-duty assignment to be performed on October 24, 2009. Grievant did demonstrate that the automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for an extra-duty assignment to be performed on October 31, 2009. Accordingly, this grievance is DENIED, in part, and GRANTED, in part.

Findings of Fact

1. Grievant has been employed by Respondent for approximately 26 years. She has been employed as a bus driver for the past three years.

2. Prior to the 2009 school year, Respondent has used a human to call bus drivers for all available extra-duty assignments. At the beginning of the 2009 school year,

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28, 2009. The original grievance form clearly asserts a violation for two specific extra-duty assignments. Grievant claims she did not know of other instances before receiving discovery for the present grievance. Grievant did not file a motion to amend her grievance. This decision is limited to the two assignments stated on the grievance form.

Respondent began using an automated calling system for extra-duty bus assignments.

3. The intent was for the automated calling system to be programmed in compliance with W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i[4], "Approval and Scheduling Curricular and Extracurricular Trips."

4. On October 20, 2009, the automated calling system was used to call bus operators for an extracurricular trip to Pennsylvania to be performed on October 24, 2009. Three buses were needed for the trip and assigned calling system numbers of 131099, 131110, and 131404.

5. When there are multiple buses used for the same trip, the automated calling system implemented by Respondent, builds a list[5] of available bus operators and calls through that list in seniority order until it finds someone who accepts the jobs. When someone accepts the job, the system removes that person from the call out list for that job.

6. All three buses for the trip to Pennsylvania on October 24, 2009, used the same call out list. If a bus operator accepted a job of operating one of the three buses, the automated call out system removed that operator's name from the call out list because they would not be eligible to drive one of the other two buses going on the same trip.

7. On October 20, 2009, Grievant received a phone call at 7:56 p.m. from the automated calling system for trip 131404. Grievant accepted the job. Consequently, Grievant's name was removed from the call out list for the other two buses going on the same trip.

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[4]Level one hearing, Respondent's Exhibit No. 1.

[5]Level one hearing, Grievant's Exhibit No. 1, bus operators seniority list dated September 1, 2009.

8. Of the three buses making the trip to Pennsylvania on October 24, 2009, one bus was transporting equipment. The other two buses were transporting band members. The bus used to transport equipment is older than the buses used to transport band members. Trip 131404 was the bus transporting the equipment. Trips 131110 and 131099 were for the buses transporting the band members.

9. Upon learning the details of trip 131404, Grievant called the automated calling system at 8:04 p.m. and declined the trip.

10. For trip 131110, the automated calling system contacted eligible bus operator David McCoy at 7:55 p.m. Mr. McCoy has more seniority as a bus operator than Grievant. Mr. McCoy declined the trip. The system then called John Chapman at 7:56 p.m. from the eligible bus operators seniority list. Mr. Chapman has less seniority as a bus operator than Grievant. Because the automated system contacted Grievant at exactly the same time, 7:56 p.m., for one of the three buses going on the same trip, and Grievant accepted the trip, Grievant's name had been removed from the list of eligible bus operators for the other two buses. Grievant was not on the list at the time the rotation arrived at her placement in seniority. At 8:00 p.m., the system contacted Sherman Myles for the trip 131110. Mr. Myles has less seniority than Grievant. Mr. Myles declined the trip. Until an operator accepted the trip at 9:35 p.m., the system contacted eligible bus operators on the list.[6]

11. Grievant was never contacted for trip 131110.[7]

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[6]*See* level one hearing, Respondent's Exhibit No. 2, "Calling Information For Job 131110."

[7]Grievant does not argue she should have been contacted before the other eligible bus operators for trip 131099 because of their greater seniority.

12. On October 26, 2009, the automated calling system was used for five extracurricular bus assignments. Three of the bus assignments were for a band trip on October 31, 2009. These bus assignments were assigned trip numbers 132221, 132223, and 132224. One assignment was for a movie trip on October 30, 2009. That trip was assigned number 132241. The fifth bus assignment was number 132239.[8]

13. On October 26, 2009, Grievant received a phone call at 7:50 p.m. from the automated calling system for trip 132241, to be performed on October 30, 2009. Grievant accepted the job.

14. On October 26, 2009, the automated calling system contacted Gary Morgan at 7:49 p.m. for trip 132224, to be performed on October 31, 2009. Mr. Morgan has more seniority than Grievant. Mr. Morgan did not accept the trip. The system did not contact Grievant. The system called John Chapman at 7:51 p.m. Mr. Chapman has less seniority than Grievant. Mr. Chapman did not accept the trip. When the system reached the end of the seniority list, it continued to call eligible bus operators starting from the top of the list. The trip was accepted by Wayne Hinkle at 9:10 p.m. Mr. Hinkle has more seniority than Grievant.

15. On October 26, 2009, the automated calling system contacted Cobert Mitchem at 7:46 p.m. for trip 132221, to be performed on October 31, 2009. Mr. Mitchem has more seniority than Grievant. Mr. Mitchem did not accept the trip. The system contacted Robert Hambrick at 7:49 p.m. Mr. Hambrick has more seniority than Grievant. Mr. Hambrick did not accept the trip. The system contacted David McCoy at 7:51 p.m. Mr.

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[8]Grievant does not argue she should have been contacted before the other eligible bus operators for trips 132239 and 132223 because of their greater seniority.

McCoy has more seniority than Grievant. Mr. McCoy did not accept the trip. The system did not contact Grievant. The system called H. Myles Sherman at 7:54 p.m. Mr. Sherman has less seniority than Grievant. Mr. Sherman did not accept the trip. When the system reached the end of the seniority list, it continued to call eligible bus operators starting from the top of the list. The trip was accepted by Terry Walkup at 8:34 p.m. Mr. Walkup has more seniority than Grievant.

Discussion

This grievance does not challenge a disciplinary action, therefore Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence.[9] "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 asserts that Respondent's automated calling system implemented in the 2009 school year is in violation of W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i. Grievant argues that she was erroneously skipped over on the call list for trips performed on October 24 and 31, 2009. W.VA. 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

[9] Procedural Rules of the West Virginia Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008).

procedure. Respondent's Policy 2.71-i likewise states that extra-duty runs are to be assigned by seniority on a rotational basis.

The two extra-duty trips in question occurred on October 24 and 31, 2009. Three buses made a trip to Pennsylvania on October 24, 2009. The bus operators were called by the automated system on October 20, 2009, to fill these three buses. Two of the buses transported band members while one bus transported the band equipment. Grievant was called by the automated system on October 20, 2009, at 7:56 p.m. Grievant accepted the assignment, trip number 131404. Upon accepting one of the three bus assignments, Grievant's name was removed from the call list. Grievant subsequently learned that the bus assignment she had accepted was for the equipment bus. Grievant did not want to drive the equipment bus because it was an older bus. She wanted to drive one of the two buses transporting the band members. At 8:04 p.m. Grievant called the automated system and cancelled her acceptance for trip number 131404. Grievant believes her name should have been placed back on the call list at this time. Respondent asserts that if a driver accepts a job and then declines the job, the driver's name will not be returned to the list because the system cannot rebuild the list during operation.

By the time Grievant called the automated system and cancelled her acceptance, at 8:04 p.m., the system had already passed Grievant's position on the seniority list. Because Grievant initially accepted trip number 131404 at 7:56 p.m., she was not on the call list for bus trip 131110, transporting band members. At 8:00 p.m., the system contacted Sherman Myles for trip 131110. Mr. Myles has less seniority than Grievant. Therefore, at least by 8:00 p.m., Grievant's position on the seniority list had already been passed. Grievant has failed to prove by a preponderance of the evidence that the

automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for trip 131110.

On October 26, 2009, the automated call system contacted bus operators for bus trips occurring on October 30 and 31, 2009. Trip 132241 was to take students to a movie on October 30, 2009. Grievant was contacted for trip 132241 on October 26, 2009, at 7:50 p.m. She accepted the assignment. Trips 132221, 132223, and 132224 were for a band trip on October 31, 2009.

Grievant asserts that the automated call system skipped over her placement on the seniority list when calling eligible bus operators to perform trips 132221 and 132224. Respondent asserts that after Grievant accepted trip 132241, to be performed on October 30, 2009, the automated system began calling from the next senior bus operator on the list. That is not a factually accurate assertion. Bus operators with more seniority than Grievant and less seniority than Grievant were contacted for trips 132221 and 132224. The call out system skipped over Grievant when contacting bus operators for trips 132221 and 132224.

The automated system erroneously did not contact Grievant for trips 132221 and 132224. Grievant has met her burden of proof to demonstrate that the automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not contact her for trips 132221 and 132224.[10]

Conclusions of Law

1. This grievance does not challenge a disciplinary action, therefore Grievant

[10]Because trips 132221 and 132224 were buses going on the same band trip occurring on October 31, 2009, Grievant would have only been able to perform one of the assignments. Grievant's relief will be back pay and benefits, with interest at the statutory rate, for one of the trips occurring on October 31, 2009.

bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. "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. W.VA. CODE § 18A-4-8b provides that extra-duty 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.

3. Respondent's Policy 2.71-i states that extra-duty runs are to be assigned by seniority on a rotational basis.

4. Grievant failed to prove by a preponderance of the evidence that the automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not call her for trip 131110.

5. Grievant demonstrated that the automated call system violated W.VA. CODE § 18A-4-8b and Respondent's Policy 2.71-i when it did not contact her for one of the bus trips occurring on October 31, 2009, either trip 132221 or 132224.

Accordingly, this grievance is DENIED, in part, and GRANTED, in part. Respondent is ORDERED to award Grievant all applicable back pay and benefits, with interest at the statutory rate, for the extra-duty trip that occurred on October 31, 2009, either trip 132221 or 132224.

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: October 19, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge