THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VERA JONES, et al.,
Grievants,

v. **DOCKET NO. 2010-0872-CONS**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, 20 bus operators[1] employed by the Monongalia County Board of Education, filed this grievance on November 20, 2009. The statement of grievance reads:

> Grievants contend that Respondent changed the method utilized to assign bus operators to perform transportation of students to and from the Shell Building. Previously this had been assigned in rotation as an extraduty assignment. At or near the beginning of th3e [sic] 2009-2010 school year, Respondent posted the assignment(s) as extracurricular assignment(s) with each assignment to be performed by the same employee throughout the school year. This change was made unilaterally without the consent of the bus operators and without due process notice and opportunity for hearing. Grievants allege a violation of West Virginia Code §§ 6C-2-2(I)(10 [sic], 18A-4-8(m), 18A-4-8b(f), 18A-2-6, & 18A-2-7.

As relief Grievants sought, "reinstatement of prior practice of rotation of the Shell Building assignment with compensation for all lost wages with interest."

A hearing was held at level one on March 8, 2010, and a level one decision denying the grievance was issued on April 6, 2010. Grievants appealed to level two on April 19,

---

[1] The Grievants are Billy Barnette, Yvette Boyles, Ronald Buchanan, Debbie Corwin, John Dolog, Freddie Eddy, II, David Gerard, Dennis Garner, Randy Given, Vera Jones, David Kisamore, Ted Lipscomb, Michelle Marshall, Elaine Prickett, Harold Shaver, Peggy Squires, Connie Tharp, Jacob Tennant, Mary Lou Verbosky, and Donald Williams.

2010. A mediation session was held on July 23, 2010. Grievants appealed to level three on August 19, 2010. A level three hearing was held before the undersigned Administrative Law Judge on December 16, 2010, at the Grievance Board's Westover office. Grievants were represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on January 13, 2011, the deadline for receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent had been treating Friday trips transporting special education students to and from the Shell Building on the campus of West Virginia University as extra-duty assignments, and as such, had been rotating the trips among the bus operators. When Respondent reviewed this situation it determined that these trips should have been treated as extracurricular assignments, meaning that they should have been posted and filled, and it corrected its error. Grievants contended that these were extra-duty trips, and, in the alternative, that Respondent had to provide notice to the bus operators before changing the manner in which these trips were assigned, or obtain the approval of the bus operators. These trips occur on a regular basis for many months during the school year. They are extracurricular assignments, and Respondent was not required by any law, rule, regulation, policy or procedure to give Grievants any notice whatsoever, or obtain their consent, before complying with the applicable law, which *requires* that the assignments be posted and filled.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievants are employed by the Monongalia County Board of Education ("MBOE") as bus operators.

2. For many years MBOE bus operators have transported special education students from various schools to the Shell Building on the campus of West Virginia University and back for physical education and physical therapy activities. The students leave school around 9:15 a.m., and return to school around 10:45 a.m., every Friday from late September through early December, and from early February through mid-April.

3. Prior to the 2009-2010 school year, the trips to the Shell Building were treated as extra-duty trips, and were assigned from the extra-duty rotation list. Some of the Grievants had made these trips.[2] As these were extra-duty assignments, the bus operators making these trips did not enter into separate contracts each time they took one of these trips. MBOE reviewed this practice, and determined that these were, by definition, extracurricular assignments which should be posted. In October of 2009, MBOE posted seven extracurricular assignments for the 2009-2010 school year, beginning November 6, 2009, to transport students from various schools to the Shell Building and back on Fridays, as needed.

4. Some of the Grievants bid on these assignments[3]. None of the Grievants was awarded any of the seven assignments.

---

[2] It is possible that all of the Grievants had made these trips, but the record developed by the parties does not address whether this was the case.

[3] It is possible that all of the Grievants bid on these assignments, but the record developed by the parties does not address whether this was the case.

5. Prior to 1992, special education students were transported to the Shell Building and back only by special needs bus operators. In 1992, the MBOE bus operators approved by a vote a resolution that all bus operators be allowed to perform these assignments. After this vote was taken, MBOE began allowing all bus operators to perform these assignments on a rotating basis as extra-duty assignments.

6. The MBOE bus operators have not approved an alternative procedure for making extracurricular assignments or extra-duty assignments.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants argued first, that the assignments at issue were extra-duty assignments, not extracurricular assignments, and second that Respondent could not change the method of making these assignments without either following the notice requirements of WEST VIRGINIA CODE § 18A-2-6, or obtaining the consent of the employees as outlined in WEST VIRGINIA CODE § 18A-4-8b(f)(2)(B). Respondent argued it was obligated by law to

change the way it made these assignments, because it concluded that it had been improperly treating them as extra-duty assignments, when, in fact, they were extracurricular assignments. As such, Respondent was not required to obtain the consent of the employees, or give Grievants any notice.

The only real issue presented is whether the assignments are extra-duty or extracurricular.

WEST VIRGINIA CODE § 18A-4-16 provides, in pertinent part, as follows:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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 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.
>
> . . .
>
> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.
>
> . . .
>
> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized 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.
>
> (6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the

> option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination . . ..

WEST VIRGINIA CODE § 18A-4-8b requires that positions be posted and filled.

Extra-duty trips are trips which are "irregular job[s] that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." W. VA. CODE § 18A-4-8b(f)(1). This CODE Section describes how extra-duty assignments are to be made, stating in § 8b(f)(2) that:

> (A) A service person with the greatest length of service time in a particular category of employment is 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 employees have had an opportunity to perform similar assignments. The cycle then is 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.

Grievants asserted that these trips to the Shell Building "seem to clearly fall within the definition of extra-duty assignments." The undersigned does not see how Grievants arrived at this conclusion. The assignments at issue occur every single Friday that school is in session, for several months at a time, not irregularly or occasionally, and they are not regular positions. These assignments are extracurricular assignments.

Respondent acknowledged that it had been improperly treating these assignments as extra-duty assignments, and corrected its mistake by posting the assignments as extracurricular assignments, and filling them in accordance with the requirements of WEST

VIRGINIA CODE §§ 18A-4-16 and 18A-4-8b. "The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinEd (Oct 31, 2008).

Grievants' reliance on WEST VIRGINIA CODE §§ 18A-2-6 and 18A-4-8b(f)(2)(B) for the propositions that Respondent could not alter its "practice unilaterally without the proper notice," or without obtaining the consent of the bus operators is misplaced. WEST VIRGINIA CODE § 18A-2-6 requires notice to the employee before his contract is modified or terminated. Grievants' contracts were not affected in any way when these assignments were posted and filled, as Grievants did not have separate contracts for performing these extra-duty assignments. WEST VIRGINIA CODE § 18A-2-6 is not applicable to this situation. WEST VIRGINIA CODE § 18A-4-8b(f)(2)(B) likewise is not applicable as it deals with adoption of an alternative procedure by service personnel for "extra-duty assignments." These were NOT extra-duty assignments, nor had any alternative procedure been adopted by the bus operators for either extra-duty or extracurricular assignments.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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. "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 regular basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered regular positions, as provided by section eight [§ 18A-4-8] of the article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article." W. VA. CODE § 18A-4-16.

3. Extra-duty trips are trips which are "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." W. VA. CODE § 18A-4-8b(f)(1).

4. WEST VIRGINIA CODE § 18A-4-16 provides that extracurricular assignments must be posted and filled pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-8b, unless "an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment . . . is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment."

5. The assignments at issue are extracurricular assignments. Respondent acted properly in correcting its mistake, and posting and filling the extracurricular assignments as is *required* by statute.

6. Grievants did not demonstrate that Respondent was required by any law, rule, regulation, policy or procedure to give Grievants notice that the assignments at issue would be posted and filled as required by law, or that Respondent was required to obtain the consent of the bus operators before correcting its mistake and following the required statutory procedure.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: May 31, 2011