THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DAVID EUGENE SHAMBURG,
Grievant,

v. **Docket No. 2011-0232-BerED**

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, David Shamburg, filed this grievance on August 25, 2010, against his employer, Berkeley County Board of Education, alleging the following:

> A Special Education bus run was posted until the end of the year and the job filled by a substitute bus driver. At the conclusion of the 09-10 school year, the job ended. However, the bus run continued through the summer. The job was not posted and the substitute driver was allowed to continue driving the bus run, although he did not have the seniority to do so had the job been posted.[1]

Grievant's relief sought states:

> Grievant seeks instatement, compensation for wages lost with interest, and all benefits, pecuniary and nonpecuniary which he would have earned in the position, including but not limited to accrued personal leave and summer seniority.

A level one hearing was conducted on September 9, 2010. The grievance was

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[1]The level three appeal form amended the Statement of Grievance to read:

> Respondent employed two substitute bus operators to perform summer or extended year bus operator positions. The positions were not posted. (The positions in question had been posted for the school term as 200-day positions ending at the conclusion of the 2009-2010 school term.) Grievant contends that this action violates W. Va. Code 18A-4-8b.

denied by decision dated September 17, 2010. Grievant appealed to level two on September 23, 2010. A mediation session was conducted on December 2, 2010. Grievant appealed to level three on December 16, 2010. After a series of continuances, a level three hearing was conducted before the undersigned Administrative Law Judge on March 19, 2012, at the Berkeley County Board of Education office. Grievant appeared in person and by his attorney, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its attorney, Gregory W. Bailey, Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on April 20, 2012.

Synopsis

Grievant argues that Respondent chose to utilize a Regional Education Services Agency ("RESA") to transport two autistic students in order to get around the posting requirement and filling of a service personnel position on the basis of the seniority requirement of W. VA. CODE § 18A-4-8b and § 18-5-39. The record established that the special needs of the students were taken into account when making the decision to contract with RESA VIII for transportation services. The West Virginia Supreme Court has ruled that boards of education are permitted wide discretion in making personnel decisions that impact the health and safety of students. In addition, Respondent took no action and made no decision regarding the selection of the bus operator to continue transporting the students in question. Therefore, Grievant is challenging a decision which was not made by his employer. Grievant did not establish by a preponderance of the evidence that Respondent abused its authority or discretion in this case.

The following findings of fact are based upon the record developed at level one and at level three.

Findings of Fact

1. Grievant is employed by Respondent as a service personnel, holding the classification of a bus operator.

2. During the 2009-2010 school year, Respondent was required to transport some special needs students to the Grafton School, a private school for autistic students, located in Winchester, Virginia. The students were nonverbal, exhibited aggression and volatile behaviors, and were subject to seizures. The students were not tolerant of changes in their daily schedules, including changes in personnel.

3. Respondent entered into a contract with the Regional Education Services Agencies ("RESA") VIII to provide the transportation. The relatively short period of the contract, and the ability of RESA VIII to hire the bus operator and aide who were transporting the students during the regular school year was the basis to utilize RESA for the summer of 2010.

4. Both the aide and the bus operator were familiar with the students. They possessed the training and skill to administer Diastat to the students in the event they suffered a seizure while in transit. Grievant acknowledged that he had never worked with the students.

5. The best interests of the students were considered in the decision to contract with RESA VIII to provide transportation for the summer of 2010 rather than post summer assignments. Given the students' aggressive and volatile behavior with unfamiliar

personnel, Respondent sought to manage the behavior by continuing the use of the bus operator and aide who were serving the students at the end of the school year.

6. Grievant was more senior than the bus operator and aide chosen by RESA VIII to provide the students' transportation.

7. The record also established that the bus operator and aide who were serving the students were trained in the administration of Diastat. Grievant does not have the necessary training to administer Diastat.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

Grievant argues that Respondent chose to utilize RESA to transport the two students to Grafton School in Winchester, Virginia, in order to get around posting and filling the service personnel position on the basis of the seniority requirements of W. VA. CODE § 18A-4-8b and § 18-5-39.[2] Respondent counters with the argument, among other

[2]W. VA. CODE § 18A-4-8b requires an employer to make decisions affecting the filling of service personnel positions "on the basis of seniority, qualifications and evaluation of

grounds for the denial of this grievance, that the Respondent had no formal role in the employment of bus operator personnel by RESA VIII, and this is a matter beyond the Respondent's jurisdiction or authority.

As noted by Respondent, it took no action and made no decision regarding the selection of the bus operator to continue transporting the students in question. Therefore, Grievant is challenging a decision which was not made by his employer. As discussed in *Rainey v. Division of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008), an employee may not use the grievance procedure to challenge actions which were not taken by his or her employer.

Concerning Grievant's contention that the provisions of W. VA. CODE § 18A-4-8B and § 18-5-39 were not followed in this instance, those statutes apply when "a county board of education" hires personnel. The Grievance Board has long recognized that "[t]he various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county boards of education employees do not apply to employees of the several state Regional Education Services Agencies." *St. Clair v. RESA-V*, Docket No.

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past service.

W. VA. CODE § 18-5-39 provides, in relevant part, as follows:

> Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code.

RESA-88-186 (Apr. 27, 1990). Despite Grievant's argument to the contrary, RESA VIII made the decision as to who would be hired to operate the bus, albeit with input from the Respondent.

It is undisputed that the special needs of the students were taken into account when making the decision to contract with RESA VIII for transportation services. It should be noted that the West Virginia Supreme Court has ruled that boards of education are permitted discretion in making personnel decisions that impact the health and safety of students. *Scott v. Randolph County Bd. of Educ.*, 217 W.Va. 128, 617 S.E.2d 478 (2005) (upholding the hiring of a less senior applicant for an aide position because the applicant was an LPN who would be working with two students who were brittle diabetics). Grievant did not establish by a preponderance of the evidence that Respondent abused its authority or discretion in this case. The record is undisputed concerning the need of the Respondent to maintain the same personnel in transporting these students in an effort to manage the students' aggressive and volatile behavior.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Grievant is challenging a decision which was not made by his employer. As discussed in *Rainey v. Division of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008), an employee may not use the grievance procedure to challenge actions which were not taken by his or her employer.

3. The Grievance Board has long recognized that "[t]he various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county boards of education employees do not apply to employees of the several state Regional Education Services Agencies." *St. Clair v. RESA-V*, Docket No. RESA-88-186 (Apr. 27, 1990).

4. The West Virginia Supreme Court has ruled that boards of education are permitted discretion in making personnel decisions that impact the health and safety of students. *Scott v. Randolph County Bd. of Educ.*, 217 W.Va. 128, 617 S.E.2d 478 (2005).

5. Grievant failed to establish by a preponderance of the evidence that Respondent abused it discretion in acting to protect the safety and health of the students involved in this grievance.

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: June 27, 2012

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Ronald L. Reece
Administrative Law Judge