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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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CECIL CASTO

v.

Docket No. 18-87-057-1

JACKSON COUNTY BOARD OF EDUCATION

DECISION

Grievant, Cecil Casto, was employed by the Jackson County Board of Education as a school bus operator until his contract of employment was terminated subsequent to a hearing on March 12, 1987. Grievant appealed to the Education Employees Grievance Board on March 17 and an evidentiary hearing was scheduled on April 6, 1987. However, the parties waived the evidentiary hearing and submitted the grievance to the hearing examiner on the transcripts of evidence adduced before the board of education and the legal memoranda of counsel.<sup>1</sup>

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<sup>1</sup> The briefing schedule established by counsel for the parties provided for filing grievant's initial brief on May 13, the brief of the school board within thirty days and a reply brief fifteen days thereafter. This protracted briefing arrangement would appear inappropriate in a dismissal case.

Two evidentiary hearings were conducted by the school board; the September 18, 1986, hearing will be referred to as (T.A\_\_) and the March 12, 1987, hearing as (T.B\_\_).

The evidence is uncontested and establishes that grievant has been employed as a school bus operator in Jackson County for twenty one years (T.A 3); he received a continuing contract on April 19, 1983 (T.B 5). On July 4, 1986, he was stopped by a Ravenswood police officer as he was leaving the parking area of a 7-11 convenience store allegedly because he was driving without headlamps (T.A 4).<sup>2</sup> However, he was arrested for driving under the influence and refused to take a breathalyzer test (T.A 5).

On July 23, 1986, grievant entered a negotiated guilty plea to a charge of reckless driving in the Municipal Court of Ravenswood and his chauffeur's license was suspended by the Department of Motor Vehicles. He had been issued a temporary driver's license permit by the arresting officer. On August 25, 1986, Jackson County School Superintendent Lannan suspended grievant from his duties without pay pursuant to W.Va. Code, 18A-2-7, effective August 25 through October 6, 1986; a hearing was scheduled on the suspension

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<sup>2</sup> Grievant does service work on farm equipment during the summer and had been on a service call at the time of the incident. He had stopped at the 7-11 to purchase cigarettes and testified that he had not been drinking (T.A 4).

on September 18, 1986.<sup>3</sup> This suspension was based upon a communique from the State Department of Education that grievant was ineligible to operate a school bus because of the revocation of grievant's chauffer's license by the Department of Motor Vehicles;<sup>3</sup> that the West Virginia Transportation Regulations provided that:

The Superintendent of the Department of Public Safety and the State Superintendent of Schools are hereby authorized to recall or refuse any school bus operator's certification for any of the following reasons:

- (c) frequent violations of traffic laws, sound safety practices regulations or ordinances, or any single violation of a serious nature.
- (d) evidence of any misconduct, negligence or action by the applicant or licensee which is sufficient reason to refuse or recall certification. Such misconduct, negligence or action shall not necessarily be confined to the operation of a school bus.<sup>4</sup> (emphasis in original)

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<sup>3</sup> State Superintendent McNeel had advised grievant and Superintendent Lannon of the revocation of grievant's chauffer license by the Department of Motor Vehicles and that, in his opinion, the temporary permit issued by the Ravenswood police officer was not equivalent to a valid chauffer's license; that, accordingly, grievant was ineligible to operate a school bus.

Grievant had retained a lawyer in Spencer to contest the suspension for refusing to take the breathalyzer test and a hearing was to be held sometime in October, 1986 (T.A 5).

<sup>4</sup> Superintendent Lannon also informed grievant that the school board would conduct a hearing on September 18, 1986, to rescind or ratify the suspension and that he (Lannon) would recommend at that time further suspension or termination of employment. (Board Exhibit 5).

The hearing on September 18, 1986, was conducted in executive session on motion of counsel for grievant and grievant acknowledged that he could not operate a school bus without proper credentials (T.A 7);<sup>5</sup> it was agreed that the suspension would be ratified and extended until February 16, 1987, to permit grievant an opportunity to resolve his problem with the Department of Motor Vehicles and State Board of Education and to then present proper credentials authorizing grievant to operate a school bus (T.A 9). However, by letter dated February 2, 1987, grievant advised the school board that he had been unable to regain his license and requested that he be transferred to a maintenance or custodian position. (Board Exhibit 8).<sup>6</sup> On February 17, 1987, grievant was advised that the suspension was being continued until February 19, 1987, at which time the matter would again be addressed by the school board; on February 20, 1987, grievant was advised that the board had extended the suspension until March 12, 1987, at which time it would consider

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<sup>5</sup> The hearing was conducted in executive session to spare grievant unnecessary humiliation and to effectuate that purpose it was further agreed that the suspension would be extended on the basis of incompetence (T.A 7,8) and that the recommendation of Superintendent Lannon would recite "charges as enumerated in executive session" and not "charged with incompetence" (T.A 8). Counsel for grievant agreed, stating that he would not appeal on the basis that the board did not enumerate the charges (T.A 8).

<sup>6</sup> At the time of hearing in March the Superintendent testified that there were no maintenance or other positions available (T.B 8).

the recommendation of the county superintendent to terminate grievant's contract because of his inability to meet the qualifications for continued employment as a school bus operator (Board Exhibits 9 and 10).

At grievant's request an evidentiary hearing was conducted on March 12, 1987, by the school board at which counsel for grievant contended that grievant's employment could not be terminated on the basis of incompetency without complying with State Board Policy 5300. It is also urged that grievant's employment should not be terminated but that he should be offered employment or reassigned to a position in which the loss of certification to operate a school bus would not affect his ability to perform the work (T.B 10). Counsel concludes that from a humanitarian standpoint grievant should not be deprived of his livelihood and his retirement benefits after twenty years of service with the school board on the evidence in this grievance.<sup>7</sup>

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<sup>7</sup> Counsel referred to but did not file a State Superintendent opinion dated December 7, 1984, involving a bus driver who had lost certification to operate a bus because of a vision problem; the State Superintendent opined the driver should be offered a job which he/she could perform (T.B 11).

Counsel for the board of education contends that apart from any humanitarian consideration<sup>8</sup> the grievant voluntarily placed himself in a position which prevented him from performing his contract and had therefore breached the contract; that by refusing to submit to the breathalyzer test he violated the administrative laws of this State and thereby voluntarily consented to the termination of his driving privileges for a year. Accordingly, counsel contends that termination is proper under either W.Va. Code, 18A-2-6 or W.Va. Code, 18A-2-8.<sup>9</sup>

In addition to the foregoing factual recitation, the following specific findings of fact and conclusions of law are appropriate.

#### FINDINGS OF FACT

1. Grievant has been employed as a school bus operator by the Jackson County Board of Education for twenty one years and received a continuing contract on April 19, 1983.

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<sup>8</sup> Counsel argued that the humanitarian argument is inappropriate presumably from a safety standpoint. Undoubtedly, county boards of education have the responsibility for managing the transportation of children to the schools in a responsible and efficient manner. Cox v. Hampshire County Board of Education, 355 S.E.2d 365, 370 (W.Va. 1987). Numerous statutes are designed to afford a special degree of safety to children transported on public school buses, among which is W.Va. Code, 17C-14-12 and the Regulations adopted by the West Virginia Department of Education. See, Lester Lucas v. West Virginia State Department of Education, Docket No. 02-87-069-2.

<sup>9</sup> The recommendation of the county superintendent was that grievant's contract be terminated because he did not  
(footnote continued)

2. On the night of July 4, 1986, grievant was arrested for driving under the influence and refused to take a breathalyzer test. On July 23, 1986, he entered a guilty plea to a charge of reckless driving and his chauffer's license was suspended by the Department of Motor Vehicles.

3. On August 25, 1986, grievant was suspended without pay upon being declared by the Department of Education ineligible to operate a school bus because of the license revocation. It was the opinion of State Superintendent McNeel that the temporary permit issued by the arresting officer was not equivalent to a valid chauffer's license.

4. A hearing was conducted by the Jackson County Board of Education on September 18, 1986, on the suspension and at grievant's request the suspension was extended until February 16, 1987, to permit grievant and opportunity to recover his license from the Department of Motor Vehicles, thereby removing the driving impediment.

5. On February 2, 1987, grievant advised the school officials that he had been unable to regain his license but requested that

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(footnote continued)

possess the necessary credentials to operate a school bus and could not meet his contractual obligations. The motion of the school board was to approve the recommendation of the superintendent and it carried on a 4-1 vote (T.B 14). Accordingly, charges, as contemplated by W.Va. Code, 18A-2-8, were not designated.

he be transferred to a maintenance or custodian position for the period of the suspension of his chauffeur's license. However, there were no such vacancies at that time.

6. On February 20, 1987, grievant was notified that the school board had extended the suspension until March 12, 1987, at which time it would consider the recommendation of the county superintendent to terminate his contract due to his inability to meet the qualifications for continued employment as a school bus operator.

7. Another evidentiary hearing was conducted by the school board on March 12, 1987, on the recommendation of the superintendent and the school board voted 4-1 to approve the recommendation and to terminate grievant's contract.

#### CONCLUSIONS OF LAW

1. W.Va. Code, 17C-14-12 provides that the West Virginia Board of Education, by and with the advice of the motor vehicle commissioner, shall adopt and enforce regulations to govern the operation of all school buses used for the transportation of school children and all employees are bound by such regulations. Subsection (b) thereof provides that an employee who violates any of these regulations is guilty of misconduct and subject to removal from employment.



2. In compliance with W.Va. Code, 17C-14-12 the West Virginia Department of Education has developed West Virginia School Transportation Regulations which govern the certification of school bus operators employed by county boards of education. Lester Lucas v. West Virginia Department of Education, Docket No. 02-87-069-2. One of the regulations require that a school bus operator hold a valid West Virginia chauffer's license and this requirement is not unreasonable.

3. A decision of the State Superintendent of Schools that the issuance of a temporary driver's permit to operate a motor vehicle is not equivalent to a valid chauffer's license to operate a school bus is entitled to great weight unless clearly erroneous. Clayburn T. Walker v. Kanawha County Board of Education, Docket No. 20-86-157-1; Lester Lucas v. West Virginia State Department of Education, Docket No. 02-87-069-2.

4. The employment contract of a school bus operator whose chauffer's license was revoked by the Department of Motor Vehicles for refusal to submit to a breathalyzer test incident to an arrest for driving while intoxicated and who is declared not qualified or eligible to drive a school bus by the State Superintendent of Schools may be terminated in accordance with W.Va. Code, 18A-2-6.

5. W.Va. Code, 18A-2-6 extends tenure status to school service personnel employees and provides the employee with the right of a hearing, if requested, before the school board before final action is taken by the board upon the termination of such employment. Wayne County Board of Education v. Tooley, 276 S.E.2d 826 (W.Va. 1981); Fayette County Board of Education v. Hunley, 288 S.E. 2d 524 (W.Va. 1982). Section 6 was followed in this grievance.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or Jackson County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
LEO CATSONIS

Chief Hearing Examiner

Dated: June 25, 1987