



**REPLY TO:**  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

**Members**  
James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

**LESTER LUCAS**

**v. DOCKET NO. 02-87-069-2**  
**BERKELEY COUNTY BOARD OF EDUCATION and/or**  
**WEST VIRGINIA STATE DEPARTMENT OF EDUCATION**

**D E C I S I O N**

Grievant, Lester Lucas, has been employed by the Berkeley County Board of Education as a bus operator since 1980. On January 20, 1987 he filed a grievance in which he alleged a violation of the West Virginia School Transportation Regulations resulting in the loss of his certification as a bus operator. Superintendent Jackson Flanigan determined that he did not have the authority to rule on this matter as certification is controlled by the State Department of Education. The grievance was waived to level four by the board of education whereupon an evidentiary hearing was conducted on May 14, 1987.

In November, 1985 the grievant elected to have a ventricular pacemaker implanted as a precautionary measure to protect him from slow heart rates. Following the surgery the grievant returned to work with the consent of his physicians. By letter dated

December 11, 1986, Paul T. Stewart, State Director of School Transportation, advised Berkeley County Transportation Director Michael Neal that the grievant would not be recertified as a school bus operator.<sup>1</sup> This decision was apparently based upon advice Mr. Stewart solicited from the Commissioner of the Department of Motor Vehicles. In a letter dated October 6, 1986 to Commissioner L. W. Bechtold, Mr. Stewart indicated his uncertainty as to how medical conditions which can now be controlled through recent advances in medical technology should be considered in the evaluation of bus operators' physical examination reports.

In reference to West Virginia School Transportation Regulations "Qualifications for the Employment of School Bus Operators", No. 8 (i) Mr. Stewart asked: "[s]hould 'current clinical diagnosis' be applied to mean that there is no condition being controlled by medication and/or regulating device(s), or

---

<sup>1</sup>Even though the School Transportation Regulations require that bus operators over the age of 50 have a physical examination semi-annually the grievant retained his certification until December, 1986. According to Dr. Alan Canonico, Director of Personnel for the Berkeley County Schools, the Director of Transportation, Michael Neal, learned of the restrictions regarding regulating devices at a meeting held in October, 1986. Mr. Neal's follow up investigation apparently resulted in the loss of the grievant's certification and subsequent dismissal.

would such control by medication and/or regulating devices be applied as 'no current clinical diagnosis?'" The Commissioner's response was that "[i]t is suggested that 'current clinical diagnosis' should be applied to mean that there is no condition controlled by medication and/or regulating device(s)."

The grievant argues that the School Transportation Regulations state that a bus operator may not be employed when there exists a current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis or any other cardiovascular disease known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure and that he has not been diagnosed as having any of these conditions.

The respondent indicates that based on the physicians' statements it has no concern regarding the grievant's medical condition or his ability to safely transport students. However, as the decision to deny the grievant certification is within the authority of the State Department of Education it had no alternative but to discontinue the grievant's employment.<sup>2</sup>

---

<sup>2</sup>As it became apparent during the level four hearing that the State Department of Education was the actual party of interest, the examiner notified State Superintendent of School Tom McNeel of the pending matter and provided the Department with an opportunity to respond to the grievance or to submit any information prior to a decision being issued. The department offered no response and the decision is hereby rendered based upon the level four hearing.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

#### Findings of Fact

1. The grievant has been employed by the Berkeley County Board of Education as a bus operator since 1980. In November, 1985 the grievant underwent elective surgery to have a ventricular pacemaker implanted as a protective measure against slow heart rates.

2. In December, 1986 Paul T. Stewart, State Director of School Transportation, advised Berkeley County Transportation Director Michael Neal that the grievant would no longer be certified as a bus operator. Mr. Stewart cited the School Transportation Regulations at page 24 and stated his understanding that no bus operator could be diagnosed as having any existing condition within the definition of "Heart" being controlled by medication and/or regulating device(s).

3. In October, 1986 Mr. Stewart had solicited the opinion of the Commissioner of the Department of Motor Vehicles who suggested "that 'current clinical diagnosis' should be applied to mean that there is no condition controlled by medication and/or regulating device(s)."

4. The grievant has submitted letters from Mark Wish, M.D. and Randy Renzi, M.D., both cardiologists and Karen Rudolph, M.D. which indicate that there is no reason why he should not continue to work. Dr. Rudolph completed the grievant's mid-year physical examination report on December 29, 1986 and certified that he met the physical qualifications for a school bus operator as listed in the West Virginia School Transportation Regulations.

5. Dr. Alan Canonico, Director of Personnel for the Berkeley County Board of Education, stated at the level four hearing that the county board of education believes the grievant to be physically qualified to safely transport students.

6. The grievant has not been diagnosed as having any of the heart related conditions listed in the School Transportation Regulations.

#### 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 Vehicles Commissioner, shall adopt and enforce regulations to govern the design and operation of all school buses used for the transportation of school children.

2. In compliance with W. Va. Code, 17C-14-12 the West Virginia Department of Education has developed the School Transportation Regulations which govern the certification of bus operators employed by county boards of education.

3. Interpretations by the Department of Education of its own regulations are entitled to great weight unless clearly erroneous. Clayburn T. Walker v. Kanawha County Board of Education and/or West Virginia Department of Education, Docket No. 20-86-157-1.

4. The State Department of Education acted in violation of its own regulations by depriving the grievant of certification when he had not been diagnosed as having any of the cardiac conditions listed under "Qualifications for the Employment of School Bus Operators".

5. "[T]he law of this State is that school personnel laws are to be strictly construed in favor of personnel, and regulations and statutes for their protection, carefully complied with "Morgan v. Pizzino, 256 S.E. 2d 592 (W. Va. 1979).

6. Due to an erroneous deprivation of certification by the Department of Education the grievant has been wrongfully suspended and dismissed from his position with the Berkeley County Board of Education. Therefore, he is entitled to certification, reinstatement and compensation for the period of time for which he has been without employment. As the liability would appear to rest with the State Department of Education it may be that the grievant's remedy relating to compensation will be in the West Virginia Court of Claims.

Accordingly, the grievance is **GRANTED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Berkeley County and such appeal must be filed within thirty (30) 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.

DATED

June 15, 1987

Sue Keller

SUE KELLER  
Hearing Examiner