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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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JOHN TONEY, JR.

v.

Docket No. 22-86-266-1

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievant, John Toney, Jr., is employed by the Lincoln County Board of Education as a school bus operator. In July, 1986, he filed a grievance alleging that a substitute bus operator with less seniority had been hired as a summer driver for the Governor's Summer Youth Program (GSYP) in violation of W.Va. Code, 18A-4-8b and W.Va. Code, 18-5-13. A level two hearing was conducted on July 16 and by letter dated July 17, 1986, Superintendent of Schools Harold R. Smith concluded that the GSYP was operated through the Governor's office, that the Lincoln County Board of Education merely provided work sites and work opportunities for the youth and considered that a lease agreement. Accordingly, Superintendent Smith dismissed the grievance at level two. Grievant appealed to level three and an evidentiary hearing was conducted on August 5, 1986; an appeal was filed at level four and an evidentiary hearing

was conducted on March 18, 1987.<sup>1</sup>

The evidence of grievant is extremely sparse but it appears that he had participated in the GSYF in previous years but had suffered an injury which incapacitated him for approximately three years; he apparently applied for summer work for 1986 and filled out an application with the help of a secretary at the board office. (T. 9). At level two he opined that the reason he had not been hired was due to political considerations because Mr. Pauley, a member of the board of education in Lincoln County, was involved in the hiring process and had a Mr. Midkiff pick up applications and he (Pauley) delivered the applications to the Governor's office. (T. 12, 13). At level three this assertion had been denied by Mr. Pauley. (T. 13)<sup>2</sup>

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The level three transcript was filed in the office of the Education Employees Grievance Board on March 16, 1987, and made a part of the record upon joint motion of the parties; references thereto will be noted (T. \_\_).

Mr. Toney had another grievance pending which he did not desire to be consolidated and separate hearings were therefore conducted, i.e., Toney v. Lincoln County Board of Education, Docket No. 22-87-847-1.

<sup>2</sup> Counsel for the grievant characterized this as a "side issue" and represented that the central issue was that W.Va. Code, 18A-4-8b(b) placed a duty on the board of education to at least recommend to the GSYF that drivers be employed by seniority and that W.Va. Code, 18-5-13 also required such a conclusion.

It became apparent that counsel was attempting to show a factual analogy to Lilly/Moten v. Fayette County Board of Education, Docket No. 10-86-251-4, which found "favoritism" in the giving of GSYF applications to certain employees by the director of services and refusing to do so for other employees. That decision is inapposite to the evidence in the instant grievance except that grievant herein also did not show that he was entitled to the position.

Grievant did not testify at the level four hearing but presented the evidence of four witnesses in an effort to show that the board of education had participated in the employment of GSYF employees by the involvement of Mr. Pauley in the selection process. However, with the exception of Mr. Richard S. Davis, a health teacher at Guyan Valley High School, who worked for the GSYF as a supervisor of students in 1986, none of these witnesses understood the role of the board of education as the employer in the GSYF or had any contact with Mr. Pauley. Consequently, counsel for grievant abandoned the contention that Mr. Pauley was acting in any official capacity for the board.<sup>3</sup>

Counsel for the grievant contends that W.Va. Code, 18A-4-8b provides that all service personnel positions are to be filled by seniority, qualifications and evaluations and notwithstanding that the hiring is done by the Governor's office the board of education has an obligation to see that the most senior applicants for the job are selected. It is further contended that W.Va. Code, 18-5-13 requires that the most senior driver be selected whenever school buses are leased to public or private corporations and that this was applicable to the instant grievance.

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<sup>3</sup> The evidence was that Mr. J. D. Midkiff, a retired school teacher and principal, was the person who had given an application to Jack Sanders, a bus driver who also had not been selected. Jack Sanders testified that he had not seen any posting in the board office or elsewhere and Willis Roy, another bus operator, had been given an application by Mr. Midkiff; however, Mr. Roy had expressed his lack of interest in the position. Mr. Midkiff stated that he had not given the applications to Mr. Pauley but that as principal of Guyan High School for eighteen years he (Midkiff) had never been able to get anyone hired on GSYF.

Mr. Davis testified that he received his application from Mr. Pauley but understood the hiring was done through the Governor's Office.

Counsel for the board of education contends that the Lincoln County Board of Education is not the employer of GSYF bus drivers and that the position was not created by the board; that summer bus drivers for the GSYF were hired by and through the Governor's office and received their pay from that office. Finally, it is contended that W.Va. Code, 18-5-13 provides for transporting school-age children to and from camps or educational activities and is inapplicable to the instant grievance.

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

#### FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education as a school bus operator.

2. Presumably in the spring or summer of 1986 grievant made application for a summer position with the Governor's Summer Youth Program (GSYP) and filed a grievance when another employee with allegedly less seniority was hired.

3. Grievant, in effect, concedes that the personnel selected for the GSYF were selected by the office of the Governor but contends either that the board of education had an obligation to recommend that selection be made in accordance with W.Va. Code, 18A-4-8b or that the school buses could not be operated by an employee who was not selected in accordance therewith.

4. Throughout this grievance process the board of education has consistently denied any employment role in the GSYF and has maintained that it merely provided work sites and work opportunity for the youth of the county.

#### CONCLUSIONS OF LAW

1. In the grievance proceeding it is incumbent upon the grievant to prove the essential elements of the grievance by a preponderance of the evidence. Harrison v. Kanawha County Board of Education, Docket No. 20-86-219.

2. Grievant has failed to prove the material allegations of the grievance as a matter of law.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or Lincoln 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: April 27, 1987