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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**GASTON CAPERTON**  
Governor

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**CHEATHAM ALSTON, JR.**

**v.**

**Docket No. 89-20-373**

**KANAWHA COUNTY BOARD OF EDUCATION**

**DECISION**

Cheatham Alston, Jr., is employed by Respondent Kanawha County Board of Education as a bus driver. Alleging that "operator vacancies at Charleston Terminal were not posted countywide" and seeking "for those jobs to be posted countywide," he filed this grievance at Level I on or about May 17, 1989. After denials there and Level II, and waiver at Level III per W.Va. Code §18-29-4(c), Grievant advanced his claim to Level IV on July 19, 1989, for decision on the facts as developed below. With the filing of Grievant's proposed findings of fact and conclusions of law on August 30, 1989, and additional information requested by the

undersigned by September 8, the case was rendered ripe for disposition.<sup>1</sup>

The essential facts of this matter are not in dispute, see n. 1. Grievant was assigned to Respondent's South Charleston Terminal until May 8, 1989, when he voluntarily transferred to the Charleston Terminal. In April 1989, that terminal's twenty drivers were advised that due to school closings and consolidations the bus runs routed therefrom would be significantly altered for 1989-90 and their number increased from twenty to twenty-five.<sup>2</sup> The drivers then at Charleston were given the option to vote on whether the

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<sup>1</sup> The parties were advised that August 31, 1989, was the deadline for submission of proposed findings of fact and conclusions of law. Grievant was made aware that he, as movant, was responsible for ensuring this Grievance Board's receipt of the Level II transcript by that date, unless the parties agreed upon all pertinent facts.

As of August 31, Grievant had not provided a Level II transcript, or inquired as to whether Respondent had done so, and Respondent had failed to submit proposals. However, "facts" suggested by Grievant and those found by Respondent at Level II are basically consistent and appear to cover all relevant particulars of this case. Furthermore, administrative notice is taken that Respondent often adopts a case's Level II findings and conclusions as its offering in that same matter at Level IV, as it apparently had done therein. Therefore, as the parties were informed would be true, it is presumed that they have entered a stipulation of fact and wish the case decided without reference to a transcript.

<sup>2</sup> Each of the twenty runs had its own driver during 1988-89, and the five new routes also are full-time assignments.

twenty-five runs should be posted countywide or only at their Terminal; with one dissent, the decision was for the more localized advertisement.<sup>3</sup>

After the in-terminal posting, eighteen of the twenty-five runs were assigned on May 1, to all Charleston drivers then there and scheduled to remain for 1989-90.<sup>4</sup> Upon Grievant's arrival at Charleston one week later, he was "offered the opportunity to select one of the remaining seven runs at the Charleston Terminal for next year." Level I Decision. Apparently, he did so, and the six runs still not manned were advertised countywide.

Grievant complains that he has advanced seniority when compared to some of his colleagues at Charleston, and that he should have been given the opportunity to bid on the more favorable runs. Respondent freely admits that the eighteen 1988-89 Charleston drivers who stayed at that terminal for 1989-90 were given first option on bidding on the twenty-five runs, and that those eighteen were awarded purely on the basis of seniority.<sup>5</sup> Respondent contends, however, that

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<sup>3</sup> According to the Level I decision, the person opposing the in-terminal posting did not favor countywide publication, but instead thought the Terminal supervisor should designate which Charleston Terminal operator should have which assignment.

<sup>4</sup> Two Charleston drivers retired at the conclusion of 1988-89.

<sup>5</sup> Decisions on filling service personnel positions must be based on seniority, as that concept is defined by W.Va. (Footnote Continued)

the twenty-five positions did not represent vacancies, since eighteen displaced drivers were already in its employ and in need of mere assignment. Level II Decision, Finding 7. It further contends that "[a]dopting the [G]rievant's interpretation of the statute would produce an absurd result as county wide posting could result in more than twenty-five bus operators being employed at the terminal." Id., Finding 8.

The "statute" referenced is W.Va. Code §18A-4-8b(b) which provides, in pertinent part:

Boards [of education] shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. . . .

Parallel language, relevant to professional position vacancies, appears in Code §18A-4-8b(a) and was recently analyzed by the Supreme Court of Appeals of West Virginia. Bd. of Educ. of the Co. of Harrison v. DeFazio, 378 S.E.2d 656 (1989). In DeFazio, two elementary institutions were closed, resulting in the creation of several jobs at Adamston and Wilsonburg Grade Schools, the schools to which

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(Footnote Continued)

Code §18A-4-8b(b), as long as the candidates have pertinent certification and acceptable evaluations of past performance. Id.; Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988).

the displaced students were reassigned. The Harrison County Board of Education did not post these new positions as vacancies on the theory that they were merely "transferred" from the defunct facilities. Following this line of reasoning, it also "transferred" a corresponding number of the closed schools' instructors to Adamston and Wilsonburg.

The Court disapproved this practice, "conclud[ing] that teaching vacancies, created by the influx of additional pupils caused by the closing of schools, are subject to the posting requirements of" §18A-4-8b(a). 378 S.E.2d 658. In doing so, the Court noted "that the legislative intent was to further 'the strong public policy favoring the hiring and advancement of teachers based on their abilities,'" citing Dillon v. Bd. of Educ. the Co. of Wyoming, 351 S.E.<sup>2d</sup> 58, 61 (W.Va. 1986). Ibid. It is true that qualifications are the dominant consideration in filling professional vacancies and that seniority generally takes that role in the service context, compare §§18A-4-8b(a), 18A-4-8b(b); see also State ex rel. Oser v. Haskins, 374 S.E.2d 184, 187 (W.Va. 1988); Dillon; Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988); n. 5, supra. However, the Court did not rely solely on the legislative intent. It also stated that "[t]he posting requirement of. . .[§18A-4-8b(a)] is clearly mandatory. . . ." At 658. For practical purposes, the language of §18A-4-8b(b) is identical, and "the word 'shall' generally should be read as requiring action."

Weimer-Godwin v. Bd. of Educ. of Upshur Co., 369 S.E.2d 726, 730 (W.Va. 1988).

Respondent, in its Level II Decision, cites its Pupil Transportation Regulations and Personnel Manual, VIII-D-2, -3, -4, p. 17, as authority for its actions herein. Those provisions are as follows:

2. Operators will continue as presently assigned unless schedule changes such as school closings, diminishing attendance, etc., occur to cancel a run or make it substantially a new run.

3. Open routes created by retirement, resignation, new routes, etc., will be posted in the terminal assembly room for five (5) working days prior to assignment (when a run is awarded, the run previously held by the operator becomes "open").

4. Assignment will be made to the regular operator at that terminal who has the longest continuous record of service with Kanawha County Schools in Pupil Transportation who desires the run, unless such assignment is not practical because of increase in deadhead mileage, bus storage, etc.

This situation, in certain regards, does not appear to be distinguishable from that in DeFazio. While the bus drivers' base of operations, i.e., the Charleston terminal, is intact, unlike the worksites of the displaced teachers in DeFazio, the fact remains that school closings and consolidations have created identifiably new assignments. This is not a situation of exigencies during a school term creating the need for alteration of bus schedules; instead, it is one

that has been anticipated for some time.<sup>6</sup> It is recognized that specifics of bus runs cannot always as easily be determined as, for example, the number and specialty of teachers a given facility will require; however, Respondent advised its Charleston drivers of the changes on or before April 20, but not to take effect until school term 1989-90.<sup>7</sup>

The theoretical similarity between DeFazio and the instant matter is not complete; a noteworthy difference also exists. In its conclusion in DeFazio, the Supreme Court reemphasizes the "strong public policy of securing the most qualified person" and, in essence, identifies this as its primary reason for ordering posting of all vacancies created in Harrison County. As mentioned, supra, qualifications are preeminent insofar as staffing professional jobs are concerned, while seniority enjoys that status in service situations; therefore, the "strong public policy" applicable to DeFazio is absent herein. Furthermore, it is significant that Grievant, who is already assigned to the Charleston Terminal, is the only complainant, although certainly a

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<sup>6</sup> The primary focus of these changes is the much-publicized closing of Charleston and Stonewall Jackson High Schools and their effective consolidation into Capital High School.

<sup>7</sup> It is also troubling that Respondent apparently considers bus runs vacated by retirement or resignation, or created as "new routes," as not being subject to countywide posting. Pupil Transportation Regulations, VIII-D-3. While minor changes in operators' schedules would generally not, as noted supra, certainly such attrition and creation would give rise to openings.

large number of others had standing to grieve the exclusive posting. While Respondent erred in its handling thereof, the potential systemwide disruption created by this Grievance Board's ordering immediate public advertisement of all twenty-five runs as vacant, since school term 1989-90 is just underway, would not be justified. While Grievant deserves a remedy, the undersigned is permitted, per Code §18-29-5(b), to fashion and "provide such relief as is deemed fair and equitable." Under these circumstances, Grievant has been denied only the opportunity to try for eighteen certain runs, and it might be argued that the most equitable outcome would be to require Respondent to provide him that chance. Grievant is entitled to at least this much, but alone such might well be an uncontrolled catalyst for across-the-board changes in Respondent's drivers' assignments and successive "domino effect" personnel actions.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant, a bus operator for Respondent, transferred from the South Charleston to the Charleston Terminal May 8, 1989.
2. On April 20, the Charleston Terminal drivers were advised by Respondent that, due to school closings and



consolidations, their runs would be significantly changed, and five additional runs would emanate from their Terminal, effective school term 1989-90.

3. These 1989-90 runs were all posted in the Charleston Terminal and awarded on May 1 to the drivers then there and scheduled to stay for the 1989-90 term.

4. The runs were not posted countywide, and Grievant did not otherwise have an opportunity to bid on all of them.

#### CONCLUSIONS OF LAW

1. "Boards [of education] shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days." W.Va. Code §18A-4-8b(b). "The word 'shall' generally should be read as requiring action." Weimer-Godwin v. Bd. of Educ. of Upshur Co., 369 S.E.2d 726, 730 (W.Va. 1988).

2. The twenty-five runs created at the Charleston Terminal, effective 1989-90, as a result of school closings and consolidations constituted "job vacancies" within the meaning of §18A-4-8b(b). See Bd. of Educ. of Harrison Co. v. DeFazio, 378 S.E.2d 656 (W.Va. 1989) (interpreting parallel statute pertinent to professional personnel); see also Lucion v. McDowell Co. Bd. of Educ., Docket No. 33-88-172 (Mar. 28, 1989) (service personnel placed on transfer were allowed, incorrectly, to be the only persons

to bid on vacancies created by reduction-in-force and retirement).<sup>8</sup>

3. To the extent that Respondent's Pupil Transportation Regulations and Personnel Manual, VIII-D-3 and -4, are inconsistent with this Decision, they are hereby declared invalid in light of Code §18A-4-8b(b).

4. This Grievance Board is empowered to fashion remedies "as. . . deemed fair and equitable." Code §18-29-5(b).

Accordingly, this grievance is **GRANTED**, and Respondent is ordered to openly post all twenty-five Charleston Terminal vacancies created for school year 1989-90, as discussed herein. Any changes in assignments need not be effective prior to the commencement of Second Semester 1989-90.<sup>9</sup>

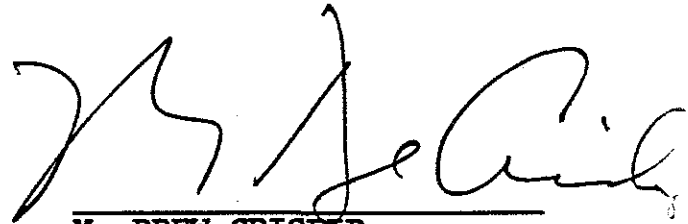
Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State

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<sup>8</sup> The case at bar is unlike Cole v. Putnam Co. Bd. of Educ., Docket No. 40-88-240 (Mar. 17, 1989), wherein it was held, at p. 9, emphasis supplied, "the geographic locale of a bus operator's regular run as a qualification for employment for extracurricular duties is reasonable."

<sup>9</sup> Respondent is advised that a more immediate remedy might be offered if this situation is repeated in the future.

Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in black ink, appearing to read 'M. Drew Crislip', written over a horizontal line.

M. DREW CRISLIP  
HEARING EXAMINER

Date: September 27, 1989