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**KENNETH CUTLIP, et al.**

**v.**

**DOCKET NO. 89-38-029**

**POCAHONTAS COUNTY BOARD OF EDUCATION**

**DECISION**

Grievants, Kenneth Cutlip, Elwood Galford and Leroy Sharp, are employed as bus operators by the Pocahontas County Board of Education (Board). These individuals filed a level one grievance on November 18, 1988 in which they alleged a violation of W.Va. Code §18A-4-16 when an extra-curricular run was combined with a regular run. The grievance was denied at levels one and two; the Board waived consideration at level three. A level four appeal was filed on January 23, 1989 and an evidentiary hearing was conducted on March 27.

On October 31, 1988 the position vacancy of bus operator was posted. The assignment included the Dunmore, Marlinton area run, known formerly as the Charles Malcom run, plus an additional activity run from Pocahontas County High School south to Marlinton and Hillsboro. Compensation was the state minimum salary plus a supplement of two

month's pay for the activity run. The grievants notified the Director of Transportation that they were interested in the regular run but not the activity run. Because they were unwilling to accept the position as posted it was subsequently awarded to another less senior applicant.

The grievants' argument is simply that the Board was statutorily required to post the positions separately. The Board argues that the grievants lack the proper standing to file a grievance on this issue as the posting did not affect their assignments; therefore, they are not true parties in interest. It asserts that combining the positions was economical and practical and was in compliance with decisions of the Education and State Employees Grievance Board and the State Superintendent of Schools.

Testimony offered at the level four hearing disclosed that in addition to the regular transportation routes, two activity runs are made daily to deliver students involved in after school activities such as clubs, sports, etc. These runs are designated as the northern and southern routes and prior to this time both had been awarded as extracurricular runs. The northern run is still treated as such and the bus operator regularly assigned to cover that area is awarded a separate extracurricular contract for the activity run.

The Board has presented legitimate and compelling reasons for its action. The activity run was twice posted as an extracurricular assignment with no applicants on either occasion. Hiring a substitute driver or a part-time

driver to cover the activity run was costly in terms of salary and other expenses. Additional savings could also be realized by combining the runs as the conclusion of the activity run is at the beginning point of the next day's regular run eliminating the cost of driving an empty bus elsewhere to begin the next day's run.

The Board has clearly established that it made a good-faith effort to fill the activity run but that there were no applicants. It has also shown that combining the activity run with the regular run in that area was practical and cost effective. However, no matter how meritorious the reasons, any actions relating to personnel must be in compliance with all pertinent statutory requirements.

W.Va. Code §18-29-2(a) defines a grievance as a claim filed by one or more affected employees alleging a violation, misapplication or misinterpretation of the statutes, policies, rules, regulations or written agreements regarding compensation, hours, employment status or discrimination, etc. under which such employees work. Since the grievants were applicants for the vacancy but declined the position based upon what they assert to be an improper posting they have established themselves to be genuine parties-in-interest with proper standing to file a grievance.

W.Va. Code §18A-4-16 defines extracurricular duties to mean, while not being limited to, any activities that occur at times other than regularly scheduled working hours including instructing, coaching, chaperoning, escorting,

providing support services or caring for the needs of students, and occur on a regularly scheduled bases. The assignment of extracurricular duties must be by the mutual consent of the employee and the employer with the terms and conditions of the agreement to be in writing and signed by both parties. An employee's contract of employment shall be separate from the extracurricular assignment and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment.

In the present situation the awarding of a regular contract of employment was made contingent upon the acceptance of an extracurricular assignment and was violative of W.Va. Code §18-4-16.

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

#### Findings of Fact

1. Grievants are employed by the Pocahontas County Board of Education as bus operators.

2. An extracurricular activity run made daily from Pocahontas County High School to the Hillsboro School District was twice posted in August 1988 and no applications were submitted on either occasion.

3. A regular run covering the same area subsequently was vacated and was posted to include the activity run. The position salary included an additional two month's salary as compensation for the extracurricular duty.

4. The grievants bid on the position but declined to accept it with the extracurricular duty included.

Conclusions of Law

1. Employees who are are qualified applicants for a position but refuse to accept it based upon an alleged improper posting are parties in interest and possess standing to file a grievance as defined by W.Va. Code §§18-29-1 et seq.

2. Adding an extracurricular assignment to a regular run making acceptance of the regular run conditional upon acceptance of the extracurricular assignment is in violation of W.Va. Code §18A-4-16.

Accordingly, the grievance is **GRANTED** and the Board is Ordered to repost and fill the positions separately.

Either party may appeal this decision to the Circuit Court of Pocahontas County or 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 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.

DATED: May 31, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER