



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

**GASTON CAPERTON**  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

**JAYELL E. FROATS**

v.

Docket Nos. 89-15-414/a,b,c,d

**HANCOCK COUNTY BOARD OF EDUCATION**

**DECISION**

Jayell E. Froats is a bus operator regularly employed by Respondent Hancock County Board of Education. On April 28, May 8 and June 1, 1989, she filed four separate grievances at Level I.<sup>1</sup> Massive procedural confusion ensued.<sup>2</sup> The first three complaints were denied at Level I

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<sup>1</sup> Two of these were submitted April 28.

<sup>2</sup> Pre-hearing, Respondent's counsel stated that a change in personnel at the county Superintendent level had been catalyst for at least some of the confusion. While this excuse was accepted at one point by the undersigned, after further information on and analysis of the situation, it is clear that Respondent did not process these grievances as expeditiously as it could have. However, Grievant also contributed to certain of the problems. Since the resolution of these disputes has already been inordinately prolonged, the cases will not again be remanded to the lower levels, as they possibly technically should be. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 440 (W.Va. 1986). It is further noted the parties did not advise the undersigned of certain significant aspects of the relevant procedural history until Level IV hearing, see, e.g., n. 3, which is quite surprising and troublesome.

and in an untimely manner, at Level II,<sup>3</sup> prior to their advancement to Level IV on July 21, 1989;<sup>4</sup> the fourth, also arriving at Level IV July 21, had not theretofore been addressed at any lower administrative plane.<sup>5</sup> The cases were docketed together at Level IV, effectively consolidated for all further proceedings. Following two subsequent remands from this Grievance Board, the case was subject to Level IV hearing in Wheeling on November 20, 1989.<sup>6</sup> The parties agreed to file proposed findings of fact and

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<sup>3</sup> These level II denials were based on the non-appearance of Grievant and/or her representative at a May 31 hearing on all three matters. At Level IV, Grievant explained she had not been informed of the hearing until on or around May 31, and that Respondent had at that point already missed the processing deadlines of W.Va. Code §18-29-4(b). She further advised she had submitted these claims to Level III on May 26 and that she believed Respondent to have then been aware of this. Pre-hearing, she offered a statement that she had sent these three cases to Level III, certified mail, on May 26, but that after four attempts by the U.S. Postal Service to effect delivery, they were unclaimed. Apparently, they were not claimed until June 16; the reason for this was not explained.

<sup>4</sup> It is unclear what, if anything, happened at Level III. W.Va. Code §18-29-4(c) gives county boards of education in West Virginia the right to waive grievances at this step in some instances; however, such waiver must be intentional and specific. See Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 89-43-222/etc. (June 12, 1989).

<sup>5</sup> While Respondent's total unresponsiveness to this complaint is condemned, under these extreme circumstances the case will be considered at Level IV without further remand. See Casey, supra at n. 2.

<sup>6</sup> While the parties engaged in significant settlement efforts at least during the second remand, which are applauded, it is noted they failed to comply with certain instructions of the very detailed remand orders, which are dated August 3, 1989, and September 29, 1989.

conclusions of law, with additional written argument, on or before December 15.<sup>7</sup> That date having passed,<sup>8</sup> this case is mature for disposition.

In preliminary remarks at the Level IV hearing, the undersigned was advised two portions of the consolidated case, namely, "b" and "c," could be dismissed. The former<sup>9</sup> was fully compromised and settled between the parties, and the latter<sup>10</sup> was withdrawn by the Grievant. Accordingly, it

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<sup>7</sup> At the conclusion of the Level IV hearing, the parties were advised of issues with which the undersigned was particularly concerned so that they might have an opportunity to address them in post-hearing documents.

<sup>8</sup> Neither party met this agreed-to-deadline or requested an extension thereof. Normally, it would be accepted that the parties had waived submission; however, due to extremely inclement weather and possible attendant mail disruption, the undersigned has considered Grievant's slightly untimely (December 18) filing.

<sup>9</sup> Grievant, citing W.Va. Code §18A-4-8b(b), complained of

Being "passed over" for extra duty assignments because of the inconsistent method of rotation, which is different from the established method. I am seeking lost pay for the 88/89 school year and correction of the said practice.

For its purposes, Respondent had labelled this claim as "Grievance #45-776."

<sup>10</sup> Again referencing Code §18A-4-8b(b), Grievant complained of

Not posting a newly created position, thus denying me to be able to improve my working conditions and use my seniority. I am seeking that all newly created positions be posted.

Respondent utilized the designation "Grievance #46-776" for this claim.

was announced those matters were **DISMISSED** and **STRICKEN** from the docket of this Grievance Board, and that order is now reaffirmed. Counts "a" and "d" of Grievant's complaint remain in need of analysis and resolution.

Docket No. 89-15-414/a<sup>11</sup>

Grievant disputed Respondent's alleged action of,

Filling the secretary's absence with one selected bus operator, contrary to. . .[W.Va. Code §§ 18A-4-15 and 18-29-2(o)]. Also using the same selected bus operator, who is less senior than me, to assist the same secretary periodically in the office therefore denying me to: Earn additional wages; Improve my working conditions; Improve and/or learn other marketable skills; Use my seniority. Contrary to. . .[Code § 18A-4-8b((b))]. I am seeking lost wages for the 88/89 school year and for the matter to be corrected according to. . .[the West Virginia Code].

Respondent explained it does not maintain a force of substitute secretaries<sup>12</sup> and that its Transportation Director's decision to utilize a bus driver with secretarial skills on an as-needed basis was a result thereof. However, it conceded the practice was improper and pledged it would cease and desist therefrom immediately. Grievant accepted this but still claimed entitlement to back wages, since she

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<sup>11</sup> Respondent numbered this grievance "44-776."

<sup>12</sup> Such practice, in and of itself, would appear to be of somewhat questionable propriety; however, no further comment thereon will be made.

had been denied a similar opportunity to fill in.<sup>13</sup> Respondent agreed backpay was the only remaining issue in this aspect of the grievance.

There is no authority in West Virginia education personnel law for using a regularly-employed bus operator as a secretary, under either a substitute or an extra-duty assignment. The other driver, C.R., was "hired" under both theories: she served as a substitute on days the incumbent Transportation Department secretary was absent, and thus was unavailable for her normal driving duties; and, on other occasions, she completed what in essence were extra-duty assignments as a "helper" to the secretary. On her "substitute" days, C.R. received her normal bus operator's wages; on her "extra-duty" days, she was afforded overtime pay on the driver's and not the secretary's scale. Because of the overtime pay, it is undisputed that C.R. got more money than if she had been engaged in driving duties solely.<sup>14</sup> However, to compensate Grievant for her alleged lost opportunities in this regard<sup>15</sup> would be to implicitly validate an

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<sup>13</sup> It was generally established that Grievant, at all times pertinent, had clerical abilities roughly equivalent to those of the driver-secretary.

<sup>14</sup> Grievant also received extra-duty wages for some days, but not as many as C.R., and appropriately for bus driving or related-skill assignments only.

<sup>15</sup> Certain claims made by Grievant, e.g., that Respondent had an absolute obligation to provide the means for her to "Improve and/or learn other marketable skills" do not have basis in the law.

illegal practice.<sup>16</sup> Furthermore, even if the practice were a correct one, Grievant failed to demonstrate with any certainty that she would have been entitled to selection for secretarial service.<sup>17</sup>

Docket No. 89-15-414/d<sup>18</sup>

In this portion, Grievant claims she was,

Not properly notified about being considered and being transferred as called for in . . . [W.Va. Code §] 18A-2-7 and Senate Bill 159.<sup>19</sup> I am seeking for said transfer to be declared null and void.

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<sup>16</sup> Simply because Respondent has engaged in an unfair or illegal practice, even if one employee has been given attendant favorable treatment, does not give another staffer, e.g., Grievant, the right to compensation. The rather trite but true maxim, "two wrongs don't make a right," is thus precisely applicable to this case.

<sup>17</sup> By post-hearing submission, Grievant first raised, at Level IV, a claim "[t]hat every Wednesday . . . [s]he is given an Early Childhood extra-duty run because she is the only drive[r] who is available at that time." No evidence was presented on this belated assertion and the same will thus not be addressed herein.

<sup>18</sup> Curiously, Respondent did not assign an internal control number to this claim when it was separately filed at Level I.

<sup>19</sup> Grievant and her representative were informed at the Level IV hearing that "Senate Bill 159" was unknown to the undersigned. Parties and their consultants would be well-advised to provide only West Virginia Code citations to West Virginia statutory law if they desire consideration of the same. At that point, Grievant's representative explained that Senate Bill 159 contained the 1989 amendments to Code §18A-2-7 and other provisions, which extended the timeframes for notification of certain personnel actions for 1988-89 only.

The undisputed evidence is that Grievant was placed on the administrative transfer list at the conclusion of the 1988-89 school year, but that Respondent missed its statutory transfer deadline. See Code §18A-2-7. It recognized this error and removed Grievant from the list; however, prior to the start of term 1989-90 for students, Grievant's 1988-89 route was supplemented by what was referred to as a "junior high run." It was established that Grievant is under a standard bus operator's contract to work up to five-and-three-quarter hours per day, and that her duties, even including the junior high run, absorb only five hours and ten minutes. Grievant protests, however, that this additional run not only was a transfer, incorrectly made since Respondent missed its deadline, but is also in essence the same route imposed upon her mid-year during 1988-89 and removed from her schedule by another Level IV grievance decision, Froats v. Hancock Co. Bd. of Educ., Docket Nos. 89-15-164/202 (Aug. 31, 1989) ("Froats I"). She and her representative, West Virginia Education Association Uni-Serv Consultant Owens Brown, apparently took the position from Froats I that Grievant could never be assigned to this particular junior high route. Mr. Brown also seemed to contend that Froats I held the 1988-89 mid-year addition to Grievant's schedule an improper transfer that could not be corrected simply because time had passed, i.e., at the beginning of the next school term.

In Froats I, Hearing Examiner Sue Keller noted Grievant's argument that the mid-year addition to her schedule was an improper Code §18A-2-7 transfer, but made no ruling on this point. Instead, she quite correctly ruled in Grievant's favor based solely on the language of Code §18A-4-8a, which prohibits changes in a service employee's schedule without her written consent once a school year starts.<sup>20</sup> In no way did Froats I prohibit Respondent from re-adding the junior high run in question to Grievant's schedule in the future, which it did prior to the commencement of 1989-90.<sup>21</sup>

The question remains, however, whether this addition was a Code §18A-2-7 transfer at all. Respondent apparently considers it so, since it offered to remove the junior high run from Grievant's schedule as soon as practicable, possibly as early as the week of November 27, 1989. Grievant

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<sup>20</sup> Strictly speaking, one school year ends on June 30 each year and the subsequent one begins July 1. W.Va. Code §18A-4-8a, in pertinent part, would have virtually no meaning whatsoever if this understanding were employed, however. It is rather obvious that what was intended by the drafters of the legislation, at least as it applies to bus operators, is that their daily schedules may not be unilaterally changed once the school year has started for students.

<sup>21</sup> In her proposed findings of fact, Grievant for the first time at Level IV complained, "the Hancock County Board of Education did not appeal the . . . [Froats I] decision and did compensate [her but] did not remove the Weir Junior High run from her schedule." Not only is this claim late, there is no evidence thereon; furthermore, alleged noncompliance with Froats I has never been in issue in the instant case.

accepted this offer, and the parties agreed that the only issue remaining herein was whether Grievant was entitled to additional salary for the junior high run from the beginning of 1989-90 until such time as she is actually relieved of the junior high duty. It appears if the run was the result of an illegal transfer, some sort of compensation, as damages, would likely be due Grievant; if it was not, clearly no such damages are due her.<sup>22</sup>

The case of Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), is instructive.<sup>23</sup> In Dunleavy, the grievant, a psychologist with responsibility for eleven schools, complained of the addition of two more schools to his schedule after the commencement of the 1988-89 school term. He argued this alteration to his schedule was an improper Code §18A-2-7 transfer.<sup>24</sup> This

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<sup>22</sup> Respondent's offer to remove the junior high run forthwith is not considered a concession that an improper transfer occurred. Even if Respondent's reason for placing Grievant on the administrative transfer list was to add this specific route to her schedule, whether or not the addition was an actual Code §18A-2-7 transfer is a question of law. There is nothing preventing a county board of education in West Virginia from granting greater procedural privileges to its employees above the rights provided them by law. See Bumgardner, supra at n. 4.

<sup>23</sup> Dunleavy was cited to the parties by the undersigned at the Level IV hearing. Amazingly, Grievant's representative did not even mention this case in his post-hearing presentations.

<sup>24</sup> Psychologists are professional, as opposed to service, employees, which bus operators are. There is no provision beyond §18A-2-7 protecting professional personnel  
(Footnote Continued)

dispute was resolved in favor of the employer for it was determined, "'[S]chedule adjustments which do not include duties or responsibilities outside of an employee's presently utilized area of certification, discipline or department. . .[are generally not] assignments amounting to a transfer. . .'" Dunleavy, p. 7, quoting VanGilder v. Mineral Co. Bd. of Educ., Docket No. 28-87-370-2 (June 16, 1988).<sup>25</sup>

Simply put, Grievant is under contract to work up to five-and-three-quarter hours per day. She has been a bus operator in Respondent's employ for several years and freely admitted at Level IV that bus routes change and must do so, at least in minor particular, with some frequency. Such are their nature, of necessity, and the undersigned takes official notice of this fact. Accordingly, a county board of education must, at least between school terms, have

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(Footnote Continued)

from mid-year schedule changes such as service staffers enjoy. See Code §18A-4-8a.

<sup>25</sup> It was significant in Dunleavy that the schedule adjustment was relatively minor, even though it required additional travel and responsibility. In a previous grievance filed by psychologist Dunleavy, over his entire 1987-88 schedule's being changed in July 1987, he successfully established an improper Code §18A-2-7 transfer. Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-87-262-1 (Jan. 5, 1988).

An interesting parallel exists between the Dunleavy and Froats scenarios, in that all or most of the additional assignment to Mr. Dunleavy upheld in the February 23, 1989, decision, was identical or very similar to a portion of his revised 1987-88 schedule which was disallowed in the earlier case.

freedom to make at least reasonable, small changes to a bus operator's daily work schedule, within the parameters of her contract, many of which cannot reasonably be effected until shortly before school starts for pupils in any given year.<sup>26</sup>

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

#### FINDINGS OF FACT

1. Grievant is a bus operator in Respondent's regular service. At all pertinent times, she has been under contract to provide up to five-and-three-quarter hours' service per workday.

2. On several occasions in school year 1988-89, and perhaps before, Respondent improperly allowed bus driver C.R. to act as substitute secretary on some occasions and on others as an extra-duty assistant to a secretary. Respondent has agreed to stop this practice forthwith. Grievant claims entitlement to compensation since she was not allowed the opportunity to perform secretarial work as was C.R.

3. Near the end of school year 1988-89, Respondent attempted to place Grievant's name on the administrative

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<sup>26</sup> Families often move in and out or within school systems during the summer, bus operators leave employment, new roads are opened, and so forth. Indeed, Code §18A-4-8a's disavowal of a county board of education's ability to make mid-year changes in a bus driver's daily schedule would appear to impose a rather onerous burden on any system which has efficiency and safety as primary goals.

transfer list for 1989-90, per W.Va. Code §18A-2-7. Respondent later conceded that it had missed the time deadlines imposed by that statute and voluntarily removed Grievant from transfer consideration.

4. Prior to the commencement of school year 1989-90 for pupils, Grievant was reassigned to her 1988-89 schedule, augmented by a "junior high run," which raised her daily actual-duty time to five hours, ten minutes. This same or a markedly similar run was improperly added to her 1988-89 schedule in January 1989, see W.Va. Code §18A-4-8a, as held in Froats v. Hancock Co. Bd. of Educ., Docket Nos. 89-15-164/202 (Aug. 31, 1988). Respondent has agreed to remove the junior high run from her 1989-90 daily schedule as soon as possible, perhaps as early as the week of November 27, 1989.

#### CONCLUSIONS OF LAW

1. There is no authority in the law for utilizing a regularly-employed bus operator as a substitute secretary. See W.Va. Code §18A-4-15.

2. There is no authority in the law for allowing a regularly-employed bus operator to engage in extra-duty secretarial or clerical work. See Code §18A-4-8b(b).

3. Grievant is unentitled to any compensation, on any theory posed, due to her lack of opportunity to work as an interim secretary or secretary's helper, as C.R. did.

4. A county board of education may unilaterally make at least minor changes in a bus operator's daily schedule for a given school year, prior to that year's commencement for students, as long as said changes are within the parameters of the employment contract, without placing the driver on administrative transfer. See Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989).

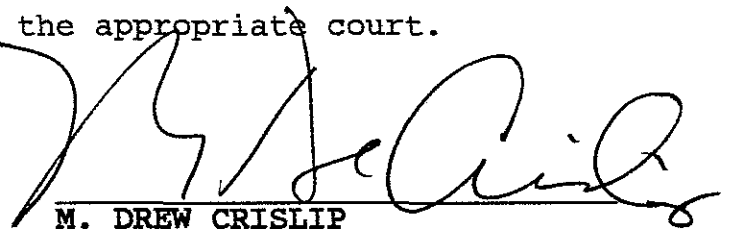
5. Grievant may not rely on Froats v. Hancock Co. Bd. of Educ., Docket Nos. 89-15-164/202 (Aug. 31, 1989), to forever bar Respondent from properly assigning her to any certain duty, even if that duty was improperly imposed upon her during a previous school term.

Accordingly, this grievance is **DENIED**; however, since Respondent voluntarily agreed to cease its practice of utilizing bus operators out of classification as secretaries,<sup>27</sup> and to release Grievant from responsibility for the "junior high run" in question for the remainder of 1989-90 as soon as practicable, it is **ORDERED** to forthwith take both steps, if it has not already done so.

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<sup>27</sup> To this extent, Docket No. 89-15-414/a is **GRANTED**, since Grievant requested, as a portion of her remedy, "for the matter to be corrected according to. . . [the West Virginia Code]."

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



M. DREW CRISLIP  
Hearing Examiner

Date: December 18, 1989