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

v.

Docket No. 89-22-649

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievant Donald Payton, a bus operator in the employ of Respondent Lincoln County Board of Education, complains that his "daily work schedule has been altered in violation of... [W.Va. Code] §18A-4-8a" and "requests reinstatement of his daily work schedule." After denials at Levels I¹ and II² and waiver at Level III, Grievant presented his claim at Level IV on November 9, 1989, where it was heard January 29, 1990.³ With the parties' submission of fact-law proposals by February 15, the matter is mature for disposition.

There is little dispute regarding the facts surrounding this controversy. Due to enrollment decline and financial

¹ The Level I grievance was filed on or before September 13, 1989.

² The Level II hearing transcript, along with the decisions at both Levels I and II, are of record at Level IV.

³ An earlier-scheduled hearing was continued for good cause shown, upon joint motion of the parties.

setbacks, Respondent deemed itself forced to eliminate five bus operator positions at the end of school term 1988-89. Attendant to this, it abolished all existing bus runs; placed all remaining drivers on administrative transfer; and posted new, revised routes as vacant. As a result of this process, Grievant was awarded "Run #23," an assignment in essence identical to the one he had held for approximately thirty years.

On each of two occasions following the commencement of school, namely September 6 and September 12, 1989, Grievant's permanent schedule was augmented. Specifically, on September 6, he was given responsibility for the "Midkiff Run," covering twelve to fourteen miles and requiring twelve to fifteen minutes to complete, and on the 12th, the "Bruntytown Run," eighteen miles and twenty-five minutes in length. Grievant identified each of these as "different runs," meaning routes totally separate and apart from Run #23. It is assumed that Midkiff and Bruntytown, like #23, were easily identified by Grievant due to their similarity to pre-1989-90 runs. However, according to Grievant, although Midkiff was part of the assigned duties of only one driver before September 6, Bruntytown was divided between two drivers before its assignment to him. At any rate, it is undisputed that Grievant's schedule was changed on the dates referenced by the additions of Midkiff and Bruntytown.

Respondent's defense includes a number of points, including that the July 19, 1989, posting under which

Grievant was awarded Run 23, Resp. Ex. 1, contained this provision: "Time schedules for bus routes are tentative and are subject to revisions. The Board of Education also reserves the right to modify individual bus routes upon student transportation needs." Respondent further explains that several schools in the area served by Grievant had changed their daily starting/ending times after the term's commencement, and this required shifts in the transportation patterns. Apparently, the primary factor for the school-schedule alterations were parental concerns. Respondent, assuming parents would prefer their children not to have to wait for a bus, travel to school, etc., in pre-daylight hours, had approved a slightly-later-in-the-day schedule for its schools; however, parents instead were displeased that their children were leaving and arriving home later than had previously been true and sought a return to an earlier schedule, which was granted.⁴

Grievant presented evidence that several runs were changed after the July 19 postings. Grievant's Exhibit 3 is a compilation of two documents noting such changes, one dated July 21 and consisting of two sheets, and the other an

⁴ Respondent's Assistant Superintendent of Schools, Tom Miller, who acted as representative at Level IV, characterized the authority to make such changes as a "combination of the principal, Superintendent and Board of Education." However, he stated his belief that the Board of Education had not been involved in the decisions, merely advised thereof.

August 28 four-pager. Although the exhibit is not so identified, Grievant testified that he obtained its documents from Respondent's central office and that they were generated by the Lincoln County Board of Education. He repeatedly noted that the additions to his schedule were never approved by Respondent to his knowledge as the changes reflected in Gr. Ex. 3 were. Respondent did not refute any of Grievant's contentions in this regard and they are accepted as accurate. It is significant that July 21 and August 28 were both prior to the commencement of school year 1989-90 for students.

W.Va. Code §18A-4-8a provides as follows, in pertinent part: "No service employee shall have his daily work schedule changed during the school year without his written consent. . . ." Bus operators are service personnel in West Virginia education personnel law. Code §18A-4-8. Respondent does not contend Grievant ever gave written consent to the Midkiff and/or Bruntytown additions; however, it states he was given at least twenty-four hours' notice and did not object to either change when told of them by Johnie Adkins, Respondent's Transportation Director.⁵ Grievant confirmed

⁵ In fact, with respect to the Bruntytown Run, Grievant asked Adkins to select which of three routes he would be given. This was immediately following Adkins' advisory to him and two other operators that each of them would have to take an additional run and that Grievant, due to his greater seniority, would be allowed first choice of the three available assignments.

this but added he neither overtly objected nor approved since "he [Mr. Adkins] is the boss and I did it [made the runs as told]."

Three cases issued by the West Virginia Education and State Employees Grievance Board are cited by the parties as precedent. Grievant relies on Coburn v. Kanawha Co. Bd. of Educ., Docket No. 20-86-087 (Sept. 10, 1986),⁶ while Respondent adheres to O'Connor v. Marion Co. Bd. of Educ., Docket No. 24-88-250 (May 31, 1989), and Smith v. Lewis Co. Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988). An analysis of these cases follows.

Coburn holds, at Conclusion of Law 2:⁷

The alteration of a school bus schedule which involves the addition of approximately 11.6 miles per day is a change of work schedule contemplated by . . . [Code §]18A-4-8a and requires the written consent of the school bus operator. . . . (This is not to say, however, that slight modifications of the work schedule cannot be made. . . and each case will be decided on its own merits. [Cite deleted].)

O'Connor involved a bus operator who complained his driving schedule was altered the first week after school started. At Level IV, it was determined that such had not occurred, but rather, that the schedule already in place had been confusing and understandably miscomprehended by the

⁶ Coburn was affirmed by the Circuit Court of Kanawha County, West Virginia, sub nom. Kanawha Co. Bd. of Educ. v. Coburn, Civil Action No. 86-C-AP-212 (Mar. 14, 1989).

⁷ The parenthetical portion of this quote is, in the original, a footnote to the conclusion of law.

grievant. The county board of education's clarification of details was held not to constitute a prohibited Code §18A-4-8a mid-year change.

In Smith, the county superintendent of schools, on July 21, 1987, wrote the bus operator-grievant to inform him he had been approved to continue in the assignment held by him during 1986-87. The letter additionally noted, however, "This action was taken with the understanding that readjustment of bus schedules were made or could be made, as needed, to serve the students of Lewis County for the 1987-88 school year." Finding of Fact 3. Prior to the start of school, Grievant was advised of and agreed to the elimination of a portion of his 1986-87 run for 1987-88; however, in October 1987, he was reassigned a percentage of that portion. Although it was noted that "[s]light alterations of a bus operator's schedule during a school year may be necessary due to need. . .," Conclusion of Law 3, the board of education's October 1987 action was deemed an illegal schedule change per Code §18A-4-8a, despite the provision regarding readjustment in the letter.

Another case, Froats v. Hancock Co. Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989), is instructive as to the type of mid-year bus schedule changes that may be considered permissible under the law. Froats took notice, at p. 10, that "bus routes change and must do so, at least in minor particular, with some frequency," for reasons including contingencies such as students' families moving to

new residences, new roads being opened, and bus operators' leaving employment. However, even in those circumstances, it is at least questionable whether a county board of education may make more than subtle amendment to a bus driver's schedule once school has commenced in a given year.⁸ At any rate, there is no evidence that occurrences of this nature were behind the addition of either Midkiff or Bruntytown to Grievant's workload. The daily-schedule changes at the schools in Grievant's service area were admittedly made by Respondent's agents, in response to parental concerns, after school started. There is no authority which would allow such concerns precedence over employment protections given personnel by statute; in fact, "School personnel. . . laws are to be strictly construed in favor of the employee." Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), syl. 1.⁹

⁸ As recognized by Froats, n. 26, "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."

⁹ Although not argued by Respondent at Level IV, the Level II evaluator noted that the additions still did not require Grievant to work beyond the regular workday for bus operators as established by Lincoln County policy. Even if this is true, however, Grievant is still protected by Code §18A-4-8a from schedule changes beyond very minor ones once school has started. Cf. Froats.

This Decision should not be interpreted that a county board of education may never take action in response to parental viewpoint on a compelling matter which effects a mid-year change in a bus operator's schedule. As noted in Coburn, "each case will be decided on its own merits."

Grievant has established a violation of Code §18A-4-8a in both instances of addition to his schedule, namely, Midkiff on September 6 and Bruntytown on September 12. Prior to Level IV hearing, the only relief he requested was a return to his original schedule; clearly, he is entitled to that, although it is noted that Grievant was relieved of the Bruntytown responsibility on or around November 9. At the hearing, for the first time, at least of record, he requested compensation at his regular rate of pay for the Midkiff and Bruntytown runs. Through his counsel, he moved that this "change in relief sought" be granted per Code §18-29-3(k), "Any change in relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." Respondent's representative objected to the motion, stating that the Lincoln County Board of Education had not had the opportunity to consider that request at the lower administrative levels. While that point is noted, and grievants must be encouraged to state their claims fairly and fully at the lowest plane, it is clear that Respondent would not have granted monetary relief had the issue been before it, since it did not find Grievant's claim meritorious from the beginning. Therefore, no prejudice to Respondent is perceived by granting Grievant's motion, and the amendment in relief requested will be allowed.

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

FINDINGS OF FACT

1. Grievant's bus-operator schedule was changed on September 6, 1989, after the commencement of school term 1989-90 for students, by the addition of a twelve to fourteen mile run, consuming twelve to fifteen minutes.

2. Grievant's schedule was again changed on September 12, by the addition of an eighteen-mile run, requiring twenty-five minutes.

3. Grievant did not consent, in writing or otherwise, to these changes.

4. The job posting upon which Grievant's original assignment was based indicated that changes in the bus runs might occur. However, it did not state these changes would occur after school started.

CONCLUSIONS OF LAW

1. "No service employee shall have his daily work schedule changed during the school year without his written consent. . . ." W.Va. Code §18A-4-8a.

2. At least with regard to bus operators, Code §18A-4-8a must be interpreted to prohibit schedule changes once school has started for students in a given year, and not before. Froats v. Hancock Co. Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989), Conc. Law 4; see also id., n. 20.

3. While "slight alterations of a bus operator's schedule during a school year may be necessary due to need," Smith v. Lewis Co. Bd. of Educ., Docket No. 21-88-043-3

(Dec. 30, 1988), Conc. Law 4, additions of twelve to fourteen and eighteen miles to a schedule are generally not such "slight alterations." See Coburn v. Kanawha Co. Bd. of Educ., Docket No. 20-86-087 (Sept. 10, 1986), aff'd, Civil Action No. 86-C-AP-212 (Cir.Ct.Kan.Co.W.Va., May 14, 1989).

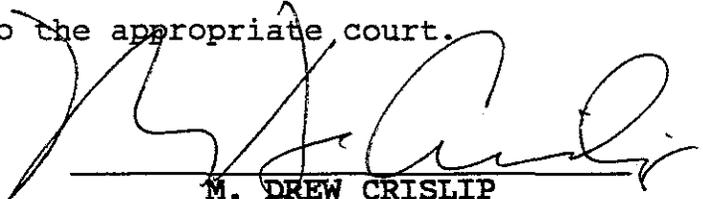
4. A provision of a job posting indicating schedules may be subject to change after school starts is illegal and void per Code §18A-4-8a. See O'Connor v. Marion Co. Bd. of Educ., Docket No. 24-88-250 (May 31, 1989).

5. Mere parental disagreement with the daily starting/ending times of school, without more, is not sufficient justification for a county board of education to take action requiring significant mid-year shifts in its bus operators' schedules. See Code §18A-4-8a.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the Midkiff Run from Grievant's schedule and to pay him, at his regular hourly wage, for his service on the Midkiff Run from September 6, 1989, through his removal from that duty, and for his service on the Bruntytown Run from September 12, 1989, through November 9, 1989, less any appropriate offset.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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: February 16, 1990