WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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LESTER P. SMITH
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TIMOTHY PAYTON
DONALD RAY MILLER

v. Docket No. 89-22-324

LINCOLN COUNTY
BOARD OF EDUCATION

D E C I S I O N

Grievants, bus operators for Respondent Lincoln County Board of Education, filed grievances in September 1989 alleging violations of W.Va. Code §§18A-2-6 and 18A-2-7

> in regard to the written contract with specific numbered bus route and changes thereof. Relief sought is retention of assigned bus route as listed in written contract.

The grievances were denied at Level I and upon appeal consolidated. At the Level II hearing Grievants added allegations of violations of W.Va. Code §§18-29-2(a) (breach of contract) and 18A-4-8a. On October 16 the consolidated grievance was denied and Grievants appealed to Level III, where on December 5 consideration was waived. Grievants appealed to Level IV and a hearing was held February 15,

1990.[1] At hearing Grievants abandoned their allegation of a violation of Code §18A-2-6 and, over Respondent's objection, asked to amend their requested relief, adding "compensation for the extra time needed to complete the changed runs." The parties agreed the decision should be based on evidence presented at Level II, supplemented at Level IV.

The pertinent facts, some of which were discussed in Payton v. Lincoln Co. Bd. of Educ., Docket No. 89-22-649 (Feb. 16, 1990), are largely undisputed. The background to this dispute was succinctly described in Payton,

> Due to enrollment decline and financial 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.

The July 19, 1989, posting for the 48 revised routes described them in detail and included the 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 based upon student transportation needs.

A copy of the bid sheet providing blanks besides numbers 1 through 48, corresponding to the bus runs, for the operators' signatures was also placed in evidence.

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[1] A hearing scheduled for January 30, 1990, was continued at Respondent's request.

The hearing was held in Hamlin at the request of Respondent. While at hearing the parties waived their briefing rights, this matter could not be considered until the transcript of the hearing was received March 12, 1990.

Each Grievant described in fair detail the run assigned him, in each instance consistently with the description of the run in the posting, and testified that the run has been changed, detailing those changes. Rather than recite all such testimony, it is sufficient to provide here the following: Grievant Payton[2] testified that changes to his assigned Run 24 added 35 miles to it, requiring about 1 hour 10 minutes of additional worktime on his daily schedule.[3] Grievant Smith testified that, in adding two hollows and taking away one from his assigned Run 28, 1 hour 15 minutes of additional worktime resulted. Similarly, worktime of 1 hour each was added to the runs assigned Grievants Roy and Mascal, Runs 27 and 32, respectively, according to their testimony, and an additional worktime of 1 hour 15 minutes resulted from changes in Grievant Brunty's Run 31. While Grievant Miller did not testify how much time was added to his workday by changes to his assigned Run 30, he testified

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[2]Grievant Payton in this case is not the same individual as the grievant in Payton, Donald Payton.

[3]Grievant Payton testified that Grievant Smith offered to take the "Sulphur Springs" run that was added but was not allowed to do so. At Level II it was argued that this testimony supports a charge of favoritism, defined by W.Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." While it is uncertain whether the allegation has been maintained at Level IV since no mention thereof was made at hearing, even if so it must be rejected, for these facts do not even support that any other employee has been treated better than Grievant Payton. See Black v. Cabell Co. Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

that three or four alterations were made and described them. According to Grievants' testimony the miles added to the runs varied from 20 to 35 miles. While the direct evidence was not clear, apparently all changes testified to were made since the beginning of the schoolyear and Respondent's Representative conceded, "The grievants' bus routes have been modified since the school term began, which was September 1st, 1989." IV Tr. 27. Grievants testified that they did not agree to the changes.

Respondent has contended throughout these proceedings that the changes were for the good of the school system, II Tr. 16, IV Tr. 4. The testimony of Johnie Adkins, who as Respondent's Transportation Director ordered the modifications, supported that most were made in order to accommodate changes in the opening and closing times of schools. He concluded,

> Some counties will issue their bus schedule out and say, "This is it." And the principals have to build their school time around the bus schedule. And we do not do that. ...[T]he principal tells us basically what he wants for his particular school, and we do our best to work a schedule that's best for that particular school.

Respondent contends that it was not illegal to make such changes, in particular relying on the fact that the posting stated that the runs could be modified and that Lincoln County Policy #12-06.00 provides "no bus route can be considered static."

In Payton the grievant alleged, like Grievants here, that changes in his bus run made after the beginning of the

school year violated Code §18A-4-8a, which provides in pertinent part, "No service employee shall have his daily work schedule changed during the school year without his written consent. ..." As in this case, Respondent did not contend that the grievants had given written consent.[4] Rather, as it does here, Respondent contended it was within its rights to make such changes whether consent was given or not.

Payton rejected Respondent's defenses, holding that, while "slight alterations of a bus operator's schedule during a school year may be necessary due to need," quoting Smith v. Lewis Co. Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988), additions of twelve to eighteen miles to a schedule are not such slight alterations and, if made without written consent of the bus operator, are contrary to Code §18A-4-8a.[5] It is recognized that it may well have

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[4]Apparently in Payton no copy of the bid sheet was placed in evidence, as it was here. While there may be an argument that, where the posting specifies that further modifications may be made, signing a bid sheet in response to such posting may in some circumstances constitute written agreement to future modifications, compare Breeding v. Kanawha Co. Bd. of Educ., Docket No. 89-20-70 (Apr. 25, 1989), no such issue need be addressed here because Respondent did not consider Grievants' signed bids as written consent.

[5]In Payton Respondent relied on Smith as supporting its position, as it does here. Payton also discussed and found that two other decisions Respondent also relied on, Coburn v. Kanawha Co. Bd. of Educ., Docket No. 20-86-087 (Sept. 10, 1986), and O'Connor v. Marion Co. Bd. of Educ., Docket No. 24-88-250 (May 31, 1989), which it again relies on here, did not support a contrary result.

been in the best interests of the schools for the modifications to be made, but, as Payton recognized, the statute does not provide for any such exception. Further, since the statute is paramount, Respondent's policy, which would allow such modifications, cannot be given effect. Accordingly, the modifications attested to in this matter must be held to be contrary to Code §18A-4-8a. Grievant's remaining allegations of additional violations therefore need not be addressed.

The final issue is whether Grievants should be awarded backpay. Code §18-29-3(k) provides in pertinent part, "Any change in the relief sought by the grievant...may be granted at level four within the discretion of the hearing examiner." Grievants' representative, in justifying amendment of the requested relief, argued that they did not believe the processing of this case would take so long, pointing to Respondent's delay at Level III. Grievants are correct that Respondent has profited from the delay in this matter since Grievants have been making the modified runs throughout the schoolyear. However, fairness to the respondent would generally require that it know from the start of a grievance proceeding what damages or other relief it may be subject to; a grievant should not be allowed generally to add relief that he should have recognized was appropriate from the beginning of the case. Accordingly, upon weighing of these equities it is considered fair that Grievants be paid additional compensation from the date five days after

Respondent received its Level III appeal, which is the date Respondent should have acted on the grievance under Code 18-29-4(c).[6]

In addition to the findings of fact and conclusions of law included in the foregoing discussion, the following are appropriate:

Findings of Fact

1. After the commencement of the 1989-1990 school year, Grievants' bus operator schedules were changed so that 20 to 35 miles were added to the runs and from one hour to one hour 15 minutes worktime was added to each run.[7]

2. Grievants did not consent to the changes.

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.

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[6]The documents provided only state that Grievants appealed October 20, 1989, a Friday. If Respondent received the appeal the next Monday, under Code §18-29-4(c) it should have acted on it by October 30 and that date would be the proper date from which backpay should be awarded.

[7]While the limited testimony of Grievant Miller did not clearly establish that this finding of fact applies to his circumstances, the record raises an inference that the several modifications to his schedule resulted in similar additions of distance and worktime.

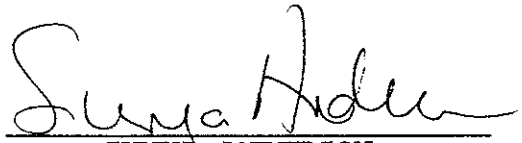
2. While "slight alterations of a bus operator's schedule during a school year may be necessary due to need," Smith v. Lewis Co. Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988), the additions to Grievants' bus schedules were not such slight violations. See Payton v. Lincoln Co. Bd. of Educ., Docket No. 89-22-649 (Feb. 16, 1990).

3. Grievants established violations of W.Va. Code §18A-4-8a.

Accordingly, this Grievance is **GRANTED**. Respondent is ORDERED to reinstate the bus runs assigned Grievants as constituted at the beginning of the school year and to provide compensation at Grievants' regular hourly wages for addtional worktime resulting from the changes, consistently with this decision.

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



SUNYA ANDERSON
HEARING EXAMINER

Date: April 3, 1990