

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CARL W. FINLEY,
Grievant,**

v.

Docket No. 2017-1146-MerED

**MERCER COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Carl W. Finley, is employed by Respondent, Mercer County Board of Education. On October 31, 2016, Grievant filed this grievance against Respondent stating, "E-school Solutions call out system has cost me 8hrs. pay on 10-28-16. Call out system has been skipping calls, going directly to voice mail or not giving complete information." For relief, Grievant seeks "8hrs. pay for trip missed [Trip # 7768] and E-school Solution to be replaced with a system that works properly or removed for bus call outs altogether."¹

A level one decision was rendered on December 13, 2016, denying the grievance. The level one decision does not state on what date the proceeding was held or whether it was a hearing or a conference. Grievant appealed to level two on December 21, 2016. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on March 1, 2017. A level three hearing was held on August 22, 2017, before the undersigned at the Grievance Board's Beckley, West Virginia office. Grievant was represented by counsel, Joe Spradling, West Virginia School Service Personnel Association. Respondent was represented by counsel, Kermit J. Moore, Brewster,

¹ The statement of grievance and request for relief are reproduced as written on the grievance form.

Morhous, Cameron, Caruth, Moore & Kersey. This matter became mature for decision on October 2, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Bus Operator. Grievant asserts Respondent's automatic callout system malfunctioned, resulting in the loss of an extra-duty assignment. Respondent asserts the system was functioning properly and Grievant failed to answer the call. Grievant failed to prove Respondent violated the applicable statute, even if its automatic callout system malfunctioned. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Bus Operator.
2. Respondent assigns substitutes and extra-duty trips to bus operators by use of an automatic telephone system, eSchool Solutions.
3. The eSchool Solutions system calls bus operators in rotation by seniority. The system calls down the seniority list in order until a bus operator accepts the assignment. The system keeps a log of the telephone calls and the result of the call, whether there was no answer, disconnection, rejection, or acceptance.
4. On October 24, 2016, the system placed calls for job number 7767, an extra-duty assignment to drive Bluefield High School students on a football trip to James Monroe High School.

5. The log for that job number shows Grievant was called, but that he did not answer the call. Grievant asserts the system called him, but that it disconnected within a few seconds, preventing him from accepting the assignment.

6. A call log from Grievant's telephone number does not show a call placed from the system at all on that date.

7. The job number listed on Grievant's grievance form is a different job number than the assignment actually at issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that the eSchool Solutions system malfunctioned in that the system disconnected the call before Grievant could accept the assignment. Respondent asserts the system did not malfunction, and that Respondent is simply required to make a reasonable, good faith attempt to contact Grievant, which it did.

The West Virginia Code controls the assignment of extra-duty work in relevant part:

Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments are made in the following manner:

(A) A service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments. The cycle then is repeated.

W. VA. CODE § 18A-4-8b(f)(2). Respondent provides this rotation through an automated telephone system. There is a factual dispute in this case in which Grievant testified that the system called him, but that it hung up within a few seconds, preventing him from accepting the assignment. Grievant's phone records do not show a call at all. Grievant testified he had successfully accepted many calls from the system over the years, but that the system had also malfunctioned in the past. Grievant had also listed a different job number on his grievance form than the number of the job he testified malfunctioned. Respondent asserts the system did not malfunction, and as proof provided the log from the system, which shows that the call was placed but not answered, and testimony from the employee in charge of the system who testified there was no indication that the system was not operating correctly on that date.

Ultimately, it is not necessary to determine whether the system malfunctioned. In applying the statute relating to service personnel substitutes, which contains identical language regarding the "opportunity to perform similar assignments,"² the West Virginia Supreme Court of Appeals has determined that a mechanical error of an automatic callout system does not deny an employee the opportunity to perform similar assignments. See *Lewis Cty. Bd. of Educ. v. Bohan*, No. 14-0521 (W.Va. Supreme Court, Apr. 9,

² "All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments." W. VA. CODE §18A-4-15(b)(2).

2015)(memorandum decision). As the word “opportunity” had not been defined in the statute, the *Bohan* court was required to interpret the word and found:

In the present case, all substitutes had the same opportunity to be called for a particular job. The appropriate personnel were listed appropriately, in order of seniority, and were called in a rotating fashion. The error was mechanical, with the callout system. Other listed substitutes had been on the adverse end of a mechanical error in the past, just as Ms. Bohan was in the present case. Further, there was evidence that Ms. Bohan had benefitted in the past from similar mechanical errors, receiving a work assignment earlier than she would have in normal circumstances. Ms. Bohan was called almost daily for substitute secretary assignments, declining many of those jobs and simply not answering the call for numerous others. Most importantly, she received assignments similar to the one which was the subject of her grievance. While there is always the risk of an unfortunate mechanical or operator error with a computerized system such as the callout system, the benefits and speed of the system far outweighed the potential errors. Therefore, Ms. Bohan's "opportunity" to be called for work, with its inherent risks and benefits, was the same as the opportunity of the others on the list.

Bohan at 10 – 11. Therefore, under the reasoning presented in *Bohan*, even if the system had malfunctioned as Grievant asserts, Respondent did not violate the statute as Grievant was not denied an opportunity to perform similar assignments as other bus operators.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-

130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The West Virginia Code controls the assignment of extra-duty work in relevant part as follows:

Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments are made in the following manner:

(A) A service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments. The cycle then is repeated.

W. VA. CODE § 18A-4-8b(f)(2).

3. In applying the statute relating to service personnel substitutes, which contains identical language regarding the "opportunity to perform similar assignments," the West Virginia Supreme Court of Appeals has determined that a mechanical error of an automatic callout system does not deny an employee the opportunity to perform similar assignments. See *Lewis Cty. Bd. of Educ. v. Bohan*, No. 14-0521 (W.Va. Supreme Court, Apr. 9, 2015)(memorandum decision).

4. Grievant failed to prove Respondent violated the applicable statute, even if its automatic callout system malfunctioned.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 31, 2017

Billie Thacker Catlett
Chief Administrative Law Judge