WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA NOWLIN,
Grievant,

v. **Docket No. 2017-1075-MerED**

MERCER COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Pamela Michele Nowlin, Grievant, filed this grievance against her employer the Mercer County Board of Education ("MCBE"), Respondent, on October 11, 2017. The original grievance statement of this bus operator provides:

> Grievant lost the opportunity for an extra-duty assignment as a result of a failure on October 5, 2016 of the E-School Solution call out system, which Respondent uses to assign extra-duty bus trips. Grievant alleges a violation of W.Va. Code 18A-4-8b.

The relief requested states:

> Grievant seeks compensation for wages lost with interest and correction of E-School Solutions system to prevent future failure in the call out system.

A hearing was held at level one on November 22, 2016, and the grievance was denied at that level on December 13, 2016. Grievant appealed to level two on December 21, 2016, and a mediation session was held on February 21, 2017. Grievant appealed to level three on March 1, 2017. A level three hearing was held before the undersigned Administrative Law Judge on May 31, 2017, at the Grievance Board's Beckley facilities. Grievant appeared in person and was represented by Joe Spradling, Esquire, WV School Service Personnel Association. Respondent was represented by Kermit Moore, Esquire. Both parties submitted post-hearing written Proposed Findings of Fact and

Conclusions of Law, and this matter became mature for decision on or about June 30, 2017, upon receipt of the last of these fact/law proposals.

Synopsis

Grievant alleges that she has lost out on employment opportunities in that she did not receive telephone call(s) from the automated dialer utilized by Respondent to contact employees for substitute and extra duty assignments. Grievant failed to demonstrate that Respondent failed to make a reasonable, good faith attempt to contact her, in rotation order, to present extra duty or substitution assignment. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Mercer County Board of Education, Respondent, as a bus operator.

2. Respondent utilizes an automatic calling system known as E-School solutions to notify / assign extra-duty work assignments to Bus Operators.

3. On October 5, 2016, E-School Solutions called Grievant for an assignment.

4. At a time reasonably near to the time of E-School Solutions initial call Grievant did not personally communicate with the automated phone system. (At the time of the initial phone contact Grievant was unaware of the communication attempt).

5. Grievant became aware of a voicemail received from E-School Solutions several hours later.

6. Grievant introduced her phone records into evidence.

7. Grievant presented a mobile phone bill listing of calls. A call from Respondent's number was listed as occurring within a two-minute interval of the automated phone system records on October 5, 2016.

8. Respondent introduced E-School Solutions phone call log into the records of the grievance.

9. The telephone call logs from Respondent's automated dialer system indicate that calls were placed to Grievant on the rotational basis utilized by the system and numerous call(s) were not answered by Grievant.

10. Between September 9, 2016, to November 11, 2016, Grievant's phone number was contacted by the E- School Solution system, a number of the phone calls went to Grievant's voicemail and/or the system indicated Grievant did not answer the call.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant alleges that she has lost out on employment opportunities in that she did not received telephone calls from the automated dialer utilized by Respondent to contact employees for substitute and extra duty assignments. Respondent specifically highlights that Grievant's grievance, as filed, is the call out of October 5, 2016 and not an indictment on every call out ever performed by the system. Grievant maintains the system fails to properly communicate extra duty or substitution assignments to her and she is of the belief the system is fundamentally flawed in the manner it contacts drivers.

A board of education is required to make a reasonable, good faith attempt to contact employees, in rotation list order, to present extra duty or substitute assignments. Attempts to contact an employee by telephone are generally acceptable.[1] *Jennings v. Wyoming County Bd. of Educ.*, Docket No. 96-55-322 (Nov. 18, 1997); *Anderson v. Raleigh County Bd. of Educ.,* Docket No. 01-41-378 (Jan. 28, 2002); *King v. Hancock Cnty. Bd. of Educ.*, Docket No. 2009-1404-CONS (May 3, 2010).

[1] "Dicta on page seven of *Johns v. Putnam County Bd. of Educ*., Docket No. 91-40-151 (July 22,1991), suggests that the statutory language mandates an offer to employees of extra duty, as opposed to actual assignment of the work. Although the statute may be subject to some interpretation, the position espoused by the Johns dicta, that W. Va. Code §18A-4-8b requires an offer rather than actual assignment, has been accepted as the proper interpretation. *Lentz v. Berkeley County Bd. of Educ.,* Docket No. 89-02-153 (Sept. 22, 1989) held that W. Va. Code §18A- 4-8b requires that a 'reasonable effort shall be made to contact employees for the purpose of offering extracurricular assignments.'" *Jennings v. Wyoming County Bd. of Educ.*, Docket No. 96-55-322 (Nov. 18, 1997).

The use of an automated dialer system to contact employees is not unreasonable. Grievant's attempt at impeaching the callout process was not persuasive. A grievant who complains of the use of an automated dialer system to contact employees must establish that the system was not functioning properly or that the grievant was not contacted when she should have been. *King v. Hancock Cnty. Bd. of Educ.*, Docket No. 2009-1404-CONS, (May 3, 2010). Whether the attempt made is sufficient must be determined on a case-by-case basis. *Jennings v. Wyoming County Bd. of Educ.*, Docket No. 96-55-322 (Nov. 18, 1997) The question becomes, "What constitutes a reasonable effort to contact employees for offering assignments?" Some good faith, reasonable effort to contact the employee is essential, but an employer need not go to extreme lengths to ensure the employee is aware of the availability of the work. How far the employer must go depends, at least in part, on the specific circumstances of each case. *Id.*

Grievant did not establish that Respondent used a process other than the approved process. Grievant acknowledges that her phone was contacted by a phone number attributable to Respondent; further it is evident that the automated calling system "did in fact" call Grievant. The information in Grievant's Exhibit 1 and 2 does not establish that the automated calling system did not function properly. It is not established with any degree of certainty that Grievant's phone failed to ring, Grievant was distracted and neglected to answer, or the automated phone system and Grievant's phone are incompatible (systematic root error). It is evident that Grievant believes the lack of notice was due to no fault of her own. Nevertheless, in this set of facts Grievant did not

establish Respondent should be held liable for her phone's failure to timely make her aware that the call out system was contacting her.

What if anything Respondent should or did not do that amounts to unreasonable, or bad faith in attempting to communicate with Grievant is unclear. **Grievant has not proven there was a flaw in the call-out process which necessitates the granting of prospective wage to Grievant.**

From the evidence presented, Grievant has failed to satisfy her burden that the automated dialer system utilized by Respondent was not functioning properly or did not contact her when she should have been contacted. Based upon the evidence presented, the automated dialer system attempted to contact Grievant. Grievant for one reason or another, was unaware of the attempt, Grievant did not establish that lack of awareness was due to a culpable action of Respondent.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. A board of education is required to make a reasonable, good faith attempt to contact employees, in rotation list order, to present extra duty or substitute assignments. Attempts to contact an employee by telephone are generally acceptable. *Jennings v. Wyoming County Bd. of Educ.*, Docket No. 96-55-322 (Nov. 18, 1997); *Anderson v. Raleigh County Bd. of Educ.,* Docket No. 01-41-378 (Jan. 28, 2002); *King v. Hancock Cnty. Bd. of Educ.*, Docket No. 2009-1404-CONS (May 3, 2010). The reasonableness and good faith of the attempts must be determined by examining the specific facts of each case. *Jennings, supra., Anderson, supra., King supra.*

3. Grievant failed to prove that Respondent did not make reasonable, good faith attempts to contact her, in proper rotational order, in assigning an extra-duty bus run(s).

4. The evidence does not establish that the automated calling system was not functioning properly, nor does it establish that Grievant was not called for a particular job for which she should have been called.

Accordingly, this 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* 156 C.S.R. 1 § 6.20 (2008).

Date: July 20, 2017

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Landon R. Brown
Administrative Law Judge