

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RONALD A. MATHENY,
Grievant,**

v.

Docket No. 2018-0225-HarED

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

DECISION

Grievant, Ronald Matheny, is employed by the Harrison County Board of Education (“Respondent” or “Board”) as a bus operator. He filed a Level One grievance on August 15, 2017, stating:

Cut original bus instead of add on bus in that area. And the original bus had the most senior driver.

For relief, Grievant sought the following:

To have the bus run reinstated.

A Level Three hearing was held before the undersigned on February 13, 2018, in Westover, West Virginia. Joe E. Spradling, Grievant’s counsel, appeared on behalf of Grievant. Richard S. Boothby, the Board’s counsel, appeared in person, together with Donna Hage, Respondent’s representative. At the conclusion of the hearing, the parties agreed to submit post-hearing arguments, both of which were received on March 22, 2018, upon which date this matter became mature for decision.

Synopsis

Grievant, a bus driver for Respondent Board of Education, was assigned to a bus route that served special needs students for approximately 16 years. There were two bus routes in Harrison County that served special needs students for a period of time, Grievant's route and another similar route. When the Board decided that it no longer needed two bus routes to serve the special needs students, it eliminated Grievant's route and transferred him to another route. Grievant asserts that he should have been given the remaining special needs bus route when his route was eliminated, because he was senior to the bus driver of the other route, citing a violation of W. Va. Code § 18A-4-8b. Grievant did not lose any benefits or salary as a result of his transfer. West Virginia law does not require that service personnel be transferred on the basis of seniority and Grievant failed to establish that Respondent's transfer of him was either arbitrary or capricious. Respondent asserts the defense that Grievant failed to timely file his grievance but failed to prove this. Therefore, this grievance must be **DENIED**.

The following facts are based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Ronald Matheny, is employed by Respondent as a bus operator. His seniority date is August 24, 1998.
2. Grievant was awarded the bus 19L route in 2001.
3. The job posting for bus 19L stated: "Bus Operator, full-time, 200-day employment term, six-hour run, to include Good Hope, Laurel Valley, Lost Creek, Romines Mill Road, to various Harrison County Schools, effective February 12, 2001.

This schedule is subject to change. The bus is located at the South Harrison Terminal.”
(Level One Decision at Exhibit Changes that I highlighted¹.)

4. In 2001, there were two special needs bus routes in the South Harrison Terminal area. (Level Three Testimony of Grievant and Donna Hage.)

5. Grievant was awarded one of these, the 19 L, special-education bus route, in 2001.

6. During the 2016-2017 school year, Grievant continued to drive bus 19L, a special education bus route. During that school year, there continued to be two special needs bus routes in the South Harrison Terminal area. (Level Three Testimony of Grievant and Donna Hage.)

7. On March 1, 2017, Grievant was notified that he was being considered for placement on the transfer list for the 2017-2018 school year. Grievant did not file a grievance regarding this notice. (Respondent’s Exhibit No. 3; Level Three Testimony of Grievant and Donna Hage.)

8. Grievant was notified on April 19, 2017, that the Board had approved his placement on the transfer list. Grievant did not file a grievance regarding his placement on the transfer list. (See Respondent’s Exhibit No. 4; Level Three Testimony of Grievant and Donna Hage.)

9. Grievant was notified by Respondent in July of 2017, of his new bus route assignment.¹

¹ The July 2017 notification of new assignment was not entered into the record at Level Three.

10. On August 15, 2017, Grievant successfully bid on another job posting, 3 SP-081717-043, which is bus route # 201.

11. On August 15, 2017, Grievant filed his Level One grievance in this matter.

12. During the 2015-2016 school year, Grievant transported only 6 students on bus 19L. (Level Three Testimony of Grievant.)

13. During the 2015-2016 school year, bus 24L transported 10 students. (Level Three Testimony of Donna Hage.)

14. During the 2016-2017 school year, Grievant transported only 6 students on bus 19L. (Level Three Testimony of Grievant.)

15. During the 2016-2017 school year, bus 24L transported 13 students. (Level Three Testimony of Donna Hage.)

16. The 2016-2017 bus 24L route was very similar to the 2017-2018 bus 24L route.

17. Bus route 19L, and the retained bus route, 24L, are not the same. (See Respondent's Exhibit No. 1 and Exhibit 2 at pages 1-3.)

18. During the 2017-2018 school year, bus 24L has been transporting all of the 18 students in the South Harrison Terminal area on a single bus without difficulty, while traveling along nearly the same route it had for years. (See Respondent's Exhibit No. 2 and Level Three Testimony of Donna Hage.)

19. Special education bus routes are annually reviewed by Cynthia Cutlip, a Transition Specialist Coordinator and, at the time of this transfer, Assistant Superintendent Anthony Fratto (now retired). Assistant Superintendent Donna Hage,

when she oversaw personnel, was also involved in this process. Carole Crawford, the new personnel director, now performs this role. (Testimony of Donna Hage.)

20. In the past, Harrison County Schools have not based the transfer of bus operators on seniority. Instead, these transfers have been based on the needs of students and the school system. (Level Three Testimony of Donna Hage.)

21. Grievant bid on the bus 201 route during the summer of 2017, and was awarded this route, and Respondent notified of this assignment sometime in July of 2017. (Level Three Testimony of Donna Hage.)

22. Grievant now transports 90 students on the bus 201 route. (Level Three Testimony of Grievant.)

23. Grievant has not lost any benefits or salary as a result of his transfer. (Level Three Testimony of Grievant.)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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 and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden.

Respondent contends that Grievant did not timely file his grievance as required, within fifteen days following the occurrence of the event upon which the grievance is

based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board.” W. Va. Code § 6C-2-4(a)(1). Grievant was notified on March 1, 2017, that he was being considered for placement on the transfer list for the 2017-2018 school year.² Grievant was further notified on April 19, 2017, that the Board had approved his placement on the transfer list. Respondent contends Grievant should have filed his grievance following one of these two events, rather than on August 15, 2017, the actual date of filing.

However, Grievant explained that he did not file a grievance after the notices of March 1, 2017, and April 19, 2017, because he had received a transfer letter every year of his employment, as matter of course, yet had never been transferred. Therefore, he had little reason to believe that he would actually be transferred for the 2017-2018 school year. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). Under these particular circumstances, Grievant rationally provides that the event that triggered the filing of his grievance was

² The spring “consideration for transfer” letter, sent annually by the Board, retains the Board’s right to transfer employees for the new school year as needed.

the July 2017, notification of his new assignment, when he was unequivocally notified of his transfer. Therefore, the undersigned finds that Grievant properly filed his grievance based upon Respondent's July 2017, notification of his new bus route assignment, as this was, "the date upon which the event became known to the employee." W. Va. Code § 6C-2-4(a)(1).

The undersigned must now consider whether Grievant filed his grievance within 15 days of receiving said notification. However, the exact date of this notification was not provided, nor was Respondent's written notification of same made a part of the record. Based upon the foregoing, without proof that Respondent's July 2017, notification of Grievant's new assignment was received more than 15 days before Grievant filed his grievance, the undersigned finds that the grievance was timely filed.

Grievant asserts that W. Va. Code § 18A-4-8b requires all school service positions to be filled on the basis of seniority, qualifications and evaluations of past service. Grievant states that "there is no issue of qualification or evaluation," in this grievance, but that Respondent should not have transferred him based upon seniority and the failure to do so violated W. Va. Code §18A-4-8b. Respondent correctly asserts that West Virginia law does not require that service personnel be transferred on the basis of seniority.³ See *Eckenrode v. Kanawha County Board of Education*, Docket No. 96-20-302 (January 22, 1997). Rather, a school board need only act reasonably and in best interests of schools when placing service employees on the transfer list. See *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E.2d [908] (1980) and *Wellman v. Mercer*

³ From his Level Three Testimony and Level One grievance form, it appeared that Grievant did not understand this.

County Bd. of Educ., Docket No. 91-17-227 (December 31, 1991). “[T]he statutes which govern the employment of school personnel do not mandate seniority-based transfers. Moreover, teachers, and other school personnel, have no ‘vested right’ to be assigned to a particular school. See *State ex rel. Hawkins v. Tyler County Bd. of Ed.*, 275 S.E.2d 908, 912 (W.Va. 1980).” *Perry, et al., v. Fayette County Bd. of Educ.*, Docket No. 96-10-205 (July 25, 1996); *Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-348 (Nov. 30, 1998); *Eckenrode, supra*. “County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious.” *Dodson v. McDowell County Bd. of Educ.*, Docket No. 93-33-243 (Feb. 15, 1994). Transfer decisions “are based on the needs of the school, as decided in good faith by the superintendent and the board. *Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E.2d [908 (1980)]. See *Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992).” *Stewart, et al., v. Kanawha County Bd. of Educ.*, Docket No. 96-20-370 (Jan. 31, 1997). “No statutory limitations have been placed on the superintendent’s authority to transfer school personnel. The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. *State ex. rel. Hawkins, supra.* ; see also, *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327/300 (Nov. 30, 1995).” *Eckenrode, Id.*

Therefore, the remaining issue is whether the Board exercised its discretion to transfer Grievant in an arbitrary or capricious manner. Grievant argued that his old bus route, 19L, and the retained bus route, 24L, were essentially the same and, therefore, when it came time to transfer one of these two bus operators, Respondent should have

transferred the least senior bus operator, rather than him. However, Respondent correctly points out that the routes are not the same.⁴ In addition, Respondent showed that the 2016-2017 bus 24L route was very similar to the new 2017-2018 bus 24L route and that bus 24L is able to transport all of the special needs students in the South Harrison Terminal area on a single bus.⁵ Respondent maintains that the decision to permit Mr. Jeffries to continue driving the new 24L route, with the special needs students, was reasonable and done in the best interests of the school system because the new 24L route bus was able to serve all of the special needs students in the South Harrison Terminal area while traveling along nearly the same route it had for years. Based upon these facts, the undersigned finds that Respondent's reasons for keeping the 24L bus route, rather than Grievant's route, and transferring Grievant were entirely rational and justifiable.⁶

In conclusion, based upon the foregoing, Grievant failed to prove that his transfer was arbitrary or capricious. Rather, the evidence established that his transfer was properly based upon the needs of the school system and its students. Respondent's decision was reasonable, logical and met the transportation needs of the special education students who live in the South Harrison Terminal area.

Accordingly, this grievance is **DENIED**.

⁴ Respondent's Exhibits No. 1 and 2.

⁵ Respondent's Exhibit No. 2 at pages 1-3.

⁶ There was hearsay evidence introduced at Level Three that Grievant's Superintendent randomly chose to eliminate Grievant's route, which is given no weight, despite Grievant's urging.

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. *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 and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden.

2. Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. W. Va. Code § 6C-2-4(a)(1).

3. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). Under these particular circumstances, Grievant rationally provides that the event that triggered the filing of his grievance was the July 2017 notification of his new assignment. Grievant filed his grievance timely.

4. West Virginia law does not require that service personnel be transferred on the basis of seniority. *Eckenrode v. Kanawha County Board of Education*, Docket No. 96-20-302 (January 22, 1997).

5. The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. *State ex. rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E.2d 908 (1980); see also, *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27- 327/300 (Nov. 30, 1995).

6. “[C]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel.” Syl. Pt. 3, in part, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W.Va. 145, 351 S.E.2d 58 (1986); Syl. Pt. 3, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

7. Respondent acted reasonably in eliminating a bus route it no longer needed and retaining a bus route it continued to need, which led to Grievant’s proper transfer.

8. Grievant failed to prove that Respondent violated any applicable laws, policies, rules or procedures with regard to his transfer.

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: May 2, 2018

Susan L. Basile
Administrative Law Judge