

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOUGLAS SKEENS,
Grievant,

v.

Docket No. 2017-1530-CONS

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Douglas Skeens, Grievant, is employed by Respondent, Lincoln County Board of Education ("Board"), as a Bus Operator. He currently drives a bus route which serves students with special needs. In October 20, 2016, Grievant filed three separate grievances which were consolidated at level one. The consolidated grievances were denied at level one by decision dated January 20, 2017. Grievant appealed to level two on January 30, 2017. Counsel for Grievant set out the three grievances as follows:

Statement of Grievance: Grievant contends that he should be permitted to perform extracurricular and extra-duty assignments in both Harts and the Guyan Valley areas since his bus route requires him to serve in both areas.

Relief: Grievant seeks the right to perform extracurricular and extra duty assignments in both the Harts and Guyan Valley areas and compensation for lost assignments with interest.

Statement of Grievance: Respondent altered Grievant's schedule without his consent by assigning him duties in another attendance area. Grievant contends these duties could have been performed by bus operators already serving special needs students in that area. Grievant alleges violation of W. Va. Code 18A-4-8a & that the alteration of this assignment was arbitrary and capricious.

Relief: Grievant seeks restoration of his route to its original dimensions and compensation for performance of additional duties with interest.

Statement of Grievance: Respondent created a regular bus operator position, but posted in fielded as to extracurricular assignments, i.e., routes 50 & 51. Grievant alleges violation of W. Va. Code 18A-4-8b, 18A-4-8a, 18A-4-16.

Relief: Grievant seeks posting of the position as a regular fulltime position.

By Order Dated May 3, 2017, it was noted that a mediation was conducted on April 21, 2017, and Grievant filed a level three appeal on April 30, 2017.

After the mediation Grievant changed counsel and continuances were granted to the parties after good cause was shown on each occasion. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on February 21, 2018. Grievant personally appeared and was represented by Joe E. Spradling, Esquire, WVSSPA, and Respondent was represented by Leslie K. Tyree, Esquire. At the close of the hearing, the parties jointly waived their rights to present Proposed Findings of Fact and Conclusions of Law. Consequently, this matter became mature for decision on that date.

Synopsis

Grievant's daily bus run was altered by requiring him to take one student with special needs from his home in Harts, West Virginia to Ranger Elementary School each morning and return him to his home each afternoon. Prior to this change, Grievant's run was exclusively in the Harts area. The trip to Ranger Elementary School required Grievant to drive in the Guyan Valley area as well. It also required that he return later than he had previously because Ranger Elementary closes later than Harts.

Grievant alleges that the Board changed his run without consent and the run could have been assigned to a driver from the Guyan Valley area. Additionally, Grievant argues that he now cannot take extra bus runs in the Harts area and he is prohibited from taking

extra runs in the Guyan Valley area because the majority of his run is part of the Harts area. Finally, Grievant argues that the Board created two separate supplemental runs and filled them with two drivers. He believes the two runs should have been posted together as a single full-time run which could be filled by a full-time bus operator.

Respondent proved that Grievant's run was altered to serve the specific needs of a child who needed to receive services at Ranger Elementary. Grievant did not prove that Respondent's decision to assign that duty to him violated law, or policy. Grievant is not prohibited from taking extra runs in the Harts area. He is prohibited from taking extra runs in the Guyan Valley area by a procedure for assigning those runs which was approved by more than two-thirds of the bus operators in Lincoln County.¹ Grievant did not prove that Respondent had any obligation to post the two supplemental runs as a single full-time run.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Douglas Skeens, is employed by the Lincoln County Board of Education as a Bus Operator. He transports students with special needs, primarily in the Harts area.

¹ W. VA. CODE § 18A-4-8b(f) states:

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two-thirds of the employees within that classification category of employment.

2. Lincoln County Schools have five attendance areas, Harts, Guyan Valley, Duval, Hamlin, and High School. The bus routes for each driver are usually contained in one attendance area plus the High School² area.

3. Grievant transports special needs students. Prior to the events leading to the filing of these consolidated grievances, his run was limited to the Harts and High School areas. During the 2016-2017 school year, one of the students who Grievant regularly transported was transferred from the Harts Pre-K - 8³ School to the Ranger Elementary School. The transfer was caused by a change in the student's IEP⁴ which required that he receive services not offered at the Harts School. Ranger Elementary school is in the Guyan Valley attendance area. Bus routes for the transportation of students with special needs often need to be altered because of changes in one or more student's IEP.

4. In October 2016, Grievant's afternoon bus run was altered to require him to pick up the student at Ranger Elementary School and transport him to his home in Harts.⁵ The student was transported to Ranger Elementary School in the morning as part of a supplemental bus run established around this time. Respondent assigned this additional mileage to Grievant's run because if it was assigned to a Bus Operator in the Guyan Valley area, the result would be that students in that area would have to remain significantly later at school for their bus to return and take them home. Director Cummings

² There is one high school in Lincoln County, so all bus operators who transport high school students travel into the High School attendance area.

³ Pre-K-8 indicated that the school offers classes from Pre-Kindergarten through the Eighth grades.

⁴ IEP stands for "Individual Education Plan."

⁵ Harts is the community which gives the Harts attendance area its name.

determined that it was in the best interest of the special needs students to assign this duty to Grievant's regular run.⁶

5. Transporting the student home from Ranger Elementary added approximately an hour to Grievant's afternoon bus run. His morning run was shortened by approximately forty-five minutes, which resulted in a fifteen-minute overall increase in his run time.⁷ Grievant did not consent to this alteration of his bus schedule.

6. Respondent created and posted two bus runs referred to as supplemental runs. The supplemental runs are designated at Routes 50 and 51. These runs also serve students with special needs. One supplemental run takes part of the students from the Harts area to Lincoln County High School and the other transports from Ranger (Guyan Valley area) to Lincoln County High School.

7. Grievant meets one of these runs in the morning and that bus transports the student to Ranger Elementary, then Grievant picks up the student and takes him home to Harts in the evening.

8. The supplemental runs take less than two hours each. If combined they would take a total of around 3.5 hours per day, which is significantly less than standard full-time bus runs. These runs occur during the normal bus run hours and cannot be taken by regular full-time bus operators. When they were posted, the successful applicant for one was a maintenance worker and the other successful applicant was a mechanic in the bus garage.

⁶ Testimony of Transportation Director, Rodney Cummings.

⁷ Grievant's level three testimony.

9. It was more efficient and a better use of the Board's resources to post these runs as two supplemental runs than one regular full-time run.⁸

10. Extra-duty assignments for West Virginia school service personnel are defined by statute as follows:

(1) For the purpose of this section, "extra-duty assignment" means an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

W. VA. CODE § 18A-4-8b (f).

11. Extra-duty assignments must be distributed among bus operators by giving the most senior driver getting the first assignment, the second most senior driver getting the second assignment, and so on until all the drivers have received an opportunity to take an extra-duty trip. The rotation then starts again at the top of the seniority list. W. VA. CODE § 18A-4-8b (f)(2)(A).

12. A county board of education may adopt a different procedure for making extra duty assignments in any classification of employment if at least two-thirds of the employees in that category vote to adopt the alternative procedure. W. VA. CODE § 18A-4-8b(f)(2)(B).

13. In the past, more than two-thirds of the bus operators employed by the Lincoln County Board of Education voted to adopt an alternative procedure for making extra-duty assignments for bus trips. The alternative procedure called for a rotation list to be maintained in each attendance area. The bus operators in each area would be considered for extra-duty runs originating in their area only based upon a rotating seniority

⁸ Uncontested testimony of Respondent's Transportation Director, Rodney Cummings.

list of all drivers with runs in that area. The only exception was that all bus operators were considered for extra-duty trips originating from the High School area.⁹

14. In Lincoln County, Bus operators who, like Grievant, have a portion of their daily run in more than one attendance area are assigned to the attendance area where the majority of their run takes place.¹⁰ No bus operator is on the list for extra-duty runs for more than one attendance area and the High School area.¹¹

15. A very small portion of Grievant's run occurs in the Guyan Valley attendance area when he picks up the student at Ranger Elementary. However, the vast majority of Grievant's daily bus run occurs in the Harts attendance area.

16. Due to the portion for Grievant's run that goes to Ranger Elementary, he usually has a time conflict that precludes him from taking extra-duty runs originating in the Harts area. Grievant has missed five extra-duty run opportunities since his regular run was altered in October 2016. He demonstrated that he would have received \$982.83 in extra compensation had he been able to take those extra-duty runs.¹²

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a

⁹ Uncontested testimony of Respondent's Transportation Director, Rodney Cummings.

¹⁰ *Id.*

¹¹ *Id.* Grievant did not know if this happened, but Director Cummings was certain about how the runs were assigned in these circumstances.

¹² Grievant Exhibit 1. This total was reached by adding together the amounts listed by Grievant for each run. The total listed by Grievant on the exhibit was \$983.75, a difference of 92 cents.

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, the party bearing the burden has not met its burden. *Id.*

Grievant presents three discrete issues that are related to the alteration of his regular bus route. The first issue to be addressed involves the alteration of Grievant's regular bus schedule without his consent. WEST VIRGINIA CODE § 18A-4-8a(j) states:

A service person may not have his or her daily work schedule changed during the school year without the employee's written consent and the person's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

When applying this provision to Bus Operator assignments the Grievance Board has consistently held that, "Slight alteration of a bus operator's driving schedule during a school year may be necessary due to need. *Smith v. Lewis County Bd. of Educ.*, Docket No. 21-88-043-3 (Dec. 30, 1988). Such alterations are not *per se* violations of Code § 18A-4-8a; such alterations must be analyzed on a case-by-case basis. *Roberts v. Lincoln County Bd. of Educ.*, Docket No. 92-22-131 (Aug. 31, 1992). A county board of education must have freedom to make at least small changes to a bus operator's daily work schedule within parameters of his contract, many of which cannot reasonably be affected until shortly before school starts for pupils in any given year, at the earliest. *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec. 18, 1989)." *Runyon and Skeens v. Lincoln County Bd. of Educ.* Docket No. 97-22-479 (Feb. 6, 1998).¹³

¹³ Grievant prevailed in this prior case because his run had been altered by adding 21 miles and 45 minutes to his driving schedule. That was considered to be more than a "slight alteration" or "small change" and therefore violated the statute.

In this matter, Respondent was forced to alter a regular bus route to accommodate the change in a student's IEP. Respondent reviewed all the options available and determined that changing Grievant's schedule was the option which best served the needs of the special needs student population in the two attendance areas. Additionally, Respondent shortened Grievant's morning run so that the total increase in his work schedule was only fifteen minutes each day. The adjustment to Grievant's work schedule was ultimately slight and was reasonable in meeting the unexpected needs of the particular student population. Accordingly, the slight alteration of Grievant's bus run without his consent did not constitute a violation of WEST VIRGINIA CODE § 18A-4-8a(j).

The next issue is that the additional run to Ranger Elementary interferes with Grievant's ability to take extra-curricular runs in the Harts area. Grievant cannot take extra-duty runs in the Guyan Valley attendance area even though part of his run is in that area because at least two-thirds of the bus operators voted to limit bus operators to taking extra-duty assignments in one attendance area plus the High School attendance area. That procedure was passed and approved by the Board in compliance with WEST VIRGINIA CODE § 18A-4-8b(f)(2)(B).¹⁴ Therefore, Respondent is constrained from allowing Grievant to take extra-duty runs in the Guyan Valley area by the procedure adopted by a super majority of the bus operators.

¹⁴ An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two-thirds of the employees within that classification category of employment. WEST VIRGINIA CODE § 18A-4-8b(f)(2)(B).

As to Grievant missing out on extra-duty assignments in the Harts area due to a conflict with his regular run, the Grievance Board has previously found that, with regard to extracurricular assignments, “it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when ‘legitimate questions existed as to Grievant’s logistical ability to perform the run[.]’” *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); See *Smith v. Putnam County Bd. of Educ.*, Docket No. 99-40-058 (Apr. 2, 1999). These rulings have been held to apply to extra-duty assignments as well. *McClung v. Nicholas County Board of Education*, Docket No. 02-34-223 (September 16, 2002).

It is unfortunate that the addition of the Ranger Elementary trip to Grievant’s run limits the number of extra-duty trips he can take in the Harts area. However, as set out above, the alteration was done after thoughtful consideration of what was in the best interest of the students. Respondent would allow Grievant to be available for extra-duty runs which conflict with his regular run by getting a substitute to take his regular run on those days. Grievant has not availed himself of that option.

The final issue is Grievant’s assertion that the two supplemental runs (Route 50 and 51) should have been posted as a single regular full-time run. Director Cummings testified that the two runs combined would be significantly shorter than the regular runs in Lincoln County. More importantly, Respondent determined that two supplemental runs resulted in a more efficient utilization of the Board’s resources and better served the students. Grievant did not contest this assertion and did not provide any authority that Respondent was required to post the two runs as a single full-time run. Respondent’s

decision was based upon reasonable grounds and was not arbitrary or capricious.¹⁵ Accordingly, the consolidated grievances are DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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, the party bearing the burden has not met its burden. *Id.*

2. WEST VIRGINIA CODE § 18A-4-8a(j) states: "A service person may not have his or her daily work schedule changed during the school year without the employee's written consent and the person's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee."

3. "Slight alteration of a bus operator's driving schedule during a school year may be necessary due to need. *Smith v. Lewis County Bd. of Educ.*, Docket No. 21-88-043-3 (Dec. 30, 1988). Such alterations are not *per se* violations of Code § 18A-4-8a; such alterations must be analyzed on a case-by-case basis. *Roberts v. Lincoln County Bd. of Educ.*, Docket No. 92-22-131 (Aug. 31, 1992). A county board of education must

¹⁵ Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

have freedom to make at least small changes to a bus operator's daily work schedule within parameters of his contract, many of which cannot reasonably be affected until shortly before school starts for pupils in any given year, at the earliest. *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec. 18, 1989)." *Runyon and Skeens v. Lincoln County Bd. of Educ.* Docket No. 97-22-479 (Feb. 6, 1998).

4. Grievant did not prove by a preponderance of the evidence that the unilateral change to his regular bus route was significant enough to violate WEST VIRGINIA CODE § 18A-4-8a(j).

5. It is not an abuse of discretion for a board of education to refuse to award an extracurricular assignment to a driver when legitimate questions existed as to the grievant's logistical ability to perform the run. *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *See Smith v. Putnam County Bd. of Educ.*, Docket No. 99-40-058 (Apr. 2, 1999). These rulings have been held to apply to extra-duty assignments as well. *McClung v. Nicholas County Board of Education*, Docket No. 02-34-223 (September 16, 2002).

6. Grievant did not prove by a preponderance of the evidence that he was entitled to reimbursement for the extra-duty trips he missed in the Harts area because of the conflict with the timing of his regular bus route.

7. An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two-thirds of the

employees within that classification category of employment. WEST VIRGINIA CODE § 18A-4-8b(f)(2)(B).

8. Grievant is not entitled to extra-duty runs in the Guyan Valley area due to a legitimate alternative procedure adopted by the Board after an affirmative vote of at least two-thirds of the bus operators.

9. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

10. Grievant did not prove that the Board was required to post supplemental bus routes 50 and 51 as a single full-time run, or that posting them as two discrete supplemental runs was arbitrary or capricious.

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: March 26, 2018.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE