

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROXANNE WHITE,
Grievant,**

v.

Docket No. 2018-0299-WebED

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

DECISION

Grievant, Roxanne White, is employed by Respondent, Webster County Board of Education. On August 28, 2017, Grievant filed this grievance against Respondent stating, "Grievant was assigned to ride a school bus in the morning and afternoon pursuant to normal county practice. Half of Grievant's bus assignment was subsequently removed and assigned to an aide from another school without Grievant's consent. Grievant alleges a violation of W.Va. Code 18A-4-8(m) and 18A-4-8a(j)." For relief, Grievant seeks "the reinstatement of her daily schedule; compensation for lost wages and benefits with interest; and any other relief necessary to make her whole."

Following the September 8, 2017 level one conference, a level one decision was rendered on September 13, 2017, denying the grievance. Grievant appealed to level two on September 25, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on November 20, 2017. A level three hearing was held on March 2, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent was represented by counsel, Richard S. Boothby, Bowles Rice, LLP. This matter became mature for decision on March 30, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Itinerant Aide/Personal Care Aide/Bus Aide. Grievant protests the removal of afternoon bus run duties, which resulted in a loss of compensation. Respondent removed the duties stating they were assigned in error based on its unwritten procedures. Grievant alleged the removal of the duties violated sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code. Respondent argued Grievant was assigned the duties only by mistake, and that it lawfully remedied the mistake by assigning the duties to a more senior employee. Respondent violated sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code and correcting what it viewed as an error made under its unwritten procedures does not excuse this violation. Accordingly, the grievance is granted.

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 an Itinerant Aide/Personal Care Aide/Bus Aide at Glade Elementary School.
2. Kristi Janie McDaniel is employed by Respondent as an Itinerant Aide/Personal Care Aide/Bus Aide at Webster County High School¹.
3. Kristi Janie McDaniel has more seniority than Grievant.

¹ Although Respondent's exhibits show Ms. McDaniel was placed at Glade Middle School, the testamentary evidence and the parties' Proposed Findings of Fact and Conclusions of Law show that, for the relevant time-period, Ms. McDaniel was placed at Webster County High School.

4. Previously, Bus Aide duties were posted as extracurricular jobs, but after Bus Aides failed to apply for these jobs, Respondent changed all Aide positions to include transportation duties, so these duties could be assigned by building principals without bidding.

5. Respondent's unwritten procedure is to offer these duties to Aides within a specific building by seniority. If no Aide accepts the duties, the duties are then assigned to the least senior Aide in the building.

6. The duties at issue involve runs on Bus 98, which is a special needs bus that transports students from Glade Elementary School and Webster County High School. Bus 98 has two morning runs and two afternoon runs.

7. At the beginning of the 2017-2018 school year, Grievant was offered and accepted the duties on Bus 98 of one morning run and both afternoon bus runs.

8. Ms. McDaniel was offered and accepted one morning run, but was not offered either of the afternoon runs.

9. Grievant performed the afternoon run duties for a short period of time at the beginning of the school year and was paid \$10 per day, plus overtime compensation for hours worked over forty per week.

10. Under Respondent's unwritten procedure, Ms. McDaniel, as the more senior Aide, should have been offered the afternoon runs.

11. Ms. McDaniel protested Respondent's failure to offer the runs to the Superintendent. After review, the administration determined that the failure to offer the afternoon runs to Ms. McDaniel was an error and assigned the afternoon runs to Ms. McDaniel.

12. As a result, Grievant's pay was reduced to \$5 per day for the morning run and her overtime hours were reduced.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 Respondent violated several statutes in reassigning her afternoon bus run duties to another employee without Grievant's written consent. Respondent argues that Grievant was assigned the duties only by mistake, and that it lawfully remedied the mistake by assigning the duties to a more senior employee.

The parties agree there was an unwritten procedure whereby Respondent assigned bus run duties in order of seniority by building, that Ms. McDaniel had more seniority than Grievant, and that Grievant did not consent to the removal of the duties in writing. Grievant asserts Respondent's actions violate the following statutes:

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.

W. VA. CODE § 18A-4-8a(j).

Without his or her written consent, a service person may not be:

...

Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

W. VA. CODE § 18A-4-8(m). Grievant further argues that there was no error because Respondent had wide discretion to assign the duties as the unwritten procedure is unenforceable in this case because “[a]ll official and enforceable personnel policies of a county board must be written and made available to its employees.” W. VA. CODE § 18A-c-12a(b)(7).

Grievant did not consent to the removal of the duties, and that removal of duties resulted in a change in her daily work schedule and a reduction of her compensation for the current fiscal year. Therefore, the removal of the duties violates sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code. Respondent argues the failure to follow its unwritten policy in assigning the bus run duties was an error it was permitted to correct as “boards of education should be encouraged to correct their errors as early as possible,” citing *Conners v. Hardy County Board of Education*, Docket No. 99-16-459 (Jan. 14, 2000), *Barrett v. Hancock County Board of Education*, Docket No. 96-15-512 (Dec. 31, 1997), and *Petrovich v. Hancock County Board of Education*, Docket No. 98-15-174 (July 13, 1998).

In *Conners*, the grievance was granted ordering the grievant be reinstated to his prior position when he had been awarded a position for which he was not qualified due to the respondent’s error in posting the position. The respondent’s failure to correct its error

was a factor citing in support of granting the grievance. In *Petrovich*, after being awarded a position, the grievant's principal changed the job duties significantly from those listed in the posting. As soon as they were alerted to this action, administration corrected the error and changed the grievant's duties to match what had been posted. The grievant alleged discrimination and requested to be placed in her previous position. The Grievance Board denied the grievance because the respondent had timely corrected its error. In *Barrett*, the superintendent had recommended the grievant for hire, which recommendation the school board rejected and ordered the candidates be reassessed. In conducting a second evaluation of the candidates, it was found that another employee was more qualified for the position and that person was ultimately hired. In denying the grievance, the Grievance Board found that the school board had corrected an error before a final determination was made and should be encouraged to do so.

None of the cases cited by Respondent involve an error in the application of a respondent's unwritten procedures or the violation of statute to correct such an error. The general notion that respondents should be encouraged to correct mistakes does not absolve a respondent of liability for the violation of statute. Therefore, the grievance must be granted.

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 her 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. West Virginia Code section 18A-4-8a(j) states as follows:

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. West Virginia Code section 18A-4-8(m) states as follows:

Without his or her written consent, a service person may not be:

...

Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

4. "All official and enforceable personnel policies of a county board must be written and made available to its employees." W. VA. CODE § 18A-c-12a(b)(7).

5. Grievant proved Respondent violated sections 18A-4-8a(j) and 18A-4-8(m) of the West Virginia Code when it removed her bus run duties without her written consent.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant's afternoon bus run duties at her prior rate of pay; to pay her back pay from the time the duties were removed until they are reinstated, including any overtime pay she would have earned; and to pay her interest on the back pay.

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 4, 2018

Billie Thacker Catlett
Chief Administrative Law Judge