DWIGHT LANHAM

v. **Docket No. 94-20-533**

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Dwight Lanham, is currently employed by the Kanawha County Board of Education ("KCBOE") as a school bus aide. He grieves his nonselection for a bus operator position. This case was denied at Levels I and II and waived at III. Grievant appealed to Level IV and a hearing was originally scheduled for November 16, 1994. Upon request from Respondent and agreement of Grievant, this hearing was continued to December 12, 1994. This case became mature for decision on January 20, 1995 after the submission of proposed findings of fact and conclusions of law. The following findings of fact are derived from the record.

Findings of Fact

1. Grievant is a sixteen-year employee of KCBOE.
2. During the first ten years of employment, Grievant worked as a bus operator.
3. On October 15, 1988, Grievant was arrested while off-duty and later convicted for driving under the influence of alcohol. Asa result of this conviction Grievant lost his commercial driving license ("CDL"), which is required for driving a school bus. Grievant was suspended from his employment and was to be terminated, as he no longer possessed the necessary certification to perform his duties.
4. Following a request from Mr. Beckett, Grievant's supervisor, Mr. William Courtney, Director of Employer/Employee Relations, recommended Grievant be allowed to transfer to the position of school bus aide so he could remain employed. Mr. Cy Faris, Associate Superintendent for Business and Personnel, and Richard Trumka, then Superintendent, approved this recommendation. This agreement, which allowed Grievant to remain employed, is presented below:

TO: Dwight Lanham

Route 3, Box 213B

Kenna, West Virginia 25248

FROM: William H. Courtney, Director

Employer/Employee Relations

SUBJECT: Suspension/Transfer

The Superintendent has concurred with Mr. Beckett's recommendation that you be allowed to transfer to a bus aide position effective November 28, 1988.

It will therefore not be necessary to proceed further with your suspension resulting from DUI and other charges against you.

There will be a significant reduction in your salary commencing November 28, 1988 (from D-3 pay grade to A pay grade) as a result of your transfer request. State law requires your written agreement to this change. Please sign below to indicate your agreement.

We sincerely hope that you are able to resolve your problems and be successful as an employee of Kanawha County Schools.

Read and agreed this 1 day of Dec , 1988:

_____

Dwight Lanham

WCH/ba

cc: George Beckett

Personnel file

5. This document was initialed by Mr. Courtney and signed by the Grievant and dated December 1, 1988. Grievant states he does not remember signing the document, but did not dispute the signature was his.

6. Grievant was then assigned to an aide position where he remains to this date.

7. But for the agreement, Grievant's position and employment with KCBOE would have been terminated because he no longer possessed the proper qualifications for a bus operator position. Level II Trans. at 25.

8. The law in effect at the time Grievant lost his CDL stated he could reapply in one year to be recertified. Grievant did not attempt to become certified until 1994 (See footnote 1), and did not apply for any bus operator positions until the 1994-95 school year. He applied for four bus operator positions at that time.

9. By letter dated July 5, 1994, Mr. Faris informed the Grievant that "due to you [sic] prior conviction for DUI of alcohol we cannot recommend you for employment as a school bus operator."

10. Three of the successful applicants for these positions had more seniority than Grievant. Grievant presented no data about the seniority of the fourth successful applicant. Grievant presented no information about any of the successful applicants' qualifications or certifications for these positions. The parties were to submit a stipulation regarding the successful applicants' qualifications or certifications by December 23, 1994. No stipulations were submitted. Testimony at the hearing indicated the parties thought Grievant would have received one of the positions, but for the DUI conviction and subsequent agreement.

11. Grievant's evaluations, both as an aide and as bus operator, have been in the satisfactory or commendable range.

12. Grievant stated he did not understand at the time he signed the agreement, that in accepting the agreement he forfeited his right to be a bus operator. The bus operator position pays more than the aide position.

13. Mr. Faris testified that the Grievant could not be a school bus operator based on the agreement and his prior conviction.

Issues

Grievant argues KCBOE violated W. Va. Code §18A-4-8b when it did not fill the bus operator positions on the basis of seniority, evaluations of past service, and qualifications. Grievant alsoargues the Respondent's actions were arbitrary and capricious. Grievant further argued the Respondent failed to establish a rational nexus between his off-duty DUI and his duties as a bus operator. (See footnote 2) Respondent argues the agreement specifies the terms under which the

Grievant holds employment, as it was "bargained for" to prevent his termination. Respondent notes Grievant received substantial benefit from the agreement, and, but for the agreement, Grievant would not be employed by KCBOE.

Discussion

W. Va. Code §18A-4-8b requires positions to be filled on the basis of seniority, qualifications, and past evaluations. However, these requirements cannot be applied to this situation without examination of the 1988 agreement between the parties. The agreement states suspension proceedings would be dropped as a result of this agreement. It is agreed by the parties that Grievant would have been terminated. Thus, Grievant received a substantial benefit from this agreement and willingly signed it. But for KCBOE's willingness to assist him by transferring him instead of terminating him, Grievant would no longer be a regular, full-time employee of KCBOE.

In this case, the parties mutually agreed to cease termination proceedings and to allow Grievant to transfer to an aide position. KCBOE retained a ten-year employee with good evaluations. Thefundamentals necessary for contract are present. McGinnis v. Enslow, 82 S.E.2d 437 (W. Va. 1954). Because there is some ambiguity present, extrinsic evidence is permitted to explain the surrounding circumstances, and the practical constructions given the contract by the parties. Kelley, Gidley, Blair and Wolfe, Inc. v. City of Parkersburg by and through Parkersburg Sanitation Bd., 438 S.E.2d 586 (W. Va. 1993).

Grievant testified he did not know the agreement forever barred him from driving a school bus. This statement is belied by Grievant's own actions. If, indeed, he thought his transfer was only for the time he did not possess his CDL, why did he wait six years to obtain his certification when he only needed, at that time, to wait one year. In the light of these facts, Grievant's testimony that he did not understand he was permanently barred from driving a bus does not ring true and is self-serving. (See footnote 3)

On the other hand, Mr. Faris was very clear in his testimony. The agreement permanently removed Grievant from driving a school bus. This was its intent. Respondent noted the position of school bus operator required the public to have the "utmost confidence in its employees", and a school bus driver with a DUI conviction could not inspire this confidence. Level II Trans. at 7. Thus, after reviewing the agreement and listening to the testimony, the undersigned finds the Grievant

willingly and knowingly bargained away his right to forever hold a bus operator position so that hecould remain a permanent, full-time employee of KCBOE. Hence, W. Va. Code §18A-4-8b has no bearing on this case.

The next issue is whether the Respondent acted arbitrarily and capriciously when it denied Grievant the position. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transferring and promotion of school personnel" as long as they exercise this discretion "reasonably, and in the best of the interest of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). Given Grievant's DUI conviction and the parties' agreement, KCBOE did not act in an arbitrary and capricious manner in not selecting Grievant to fill the posted bus operator positions.

The above discussion is supplemented by the following conclusions of law:

Conclusions of Law

1. In a nondisciplinary action the Grievant has the burden of proving his case by a preponderance of the evidence.

2. In 1988, the parties entered into a contract which prevented Grievant's termination, allowed him to remain a regular full-time employee of Respondent, and prevented him from having future employment as a school bus operator.

3. No violation of W. Va. Code §18A-4-8b occurred.

4. The action of KCBOE in denying a school bus operator position to an employee with a prior DUI conviction, who had signedan agreement accepting a transfer to prevent his dismissal, was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 28, 1995

Footnote: 1The current law requires an individual to wait two years before he can apply for recertification.

Footnote: 2This argument is found to be without merit based on Syl. Pt. 2 of Golden v. Bd. of Educ. of the County of Harrison, 285 S.E.2d 665 (W. Va. 1981). Clearly, there is a "rational nexus between the conduct performed outside of the job and the duties the employee is to perform."

Footnote: 3The last paragraph of the agreement indicates KCBOE hopes the Grievant will be able to resolve his problems. There was no testimony about these problems.