MARY ANN MULLINS , ET AL., .

Grievants, .

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v. . Docket Number: 94-23-283

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LOGAN COUNTY BOARD OF EDUCATION, .

Respondent. .

D E C I S I O N

Grievants, Mary Ann Mullins, Joanna Adkins, Mary Butcher, Darlene Dingess and Imogene Conley filed this grievance on or about May 16, 1994, pursuant to the provisions of West Virginia Code §§18-29-1, et seq. The following statement of grievance is contained on the level one form:

> Grievants allege that the Respondent has violated West Virginia Code §18A-4-8b in its failure to post bus operators' positions in the Chapmanville area after a reorganization which has resulted in the elimination of some runs and alterations to other runs in the Chapmanville area. The Grievants seek posting of five specific positions currently held by Erwin Workman, Frank Christian, Donald Jarvis, Stanley Dingess and Patricia Lovejoy.

This grievance was denied at the lower two levels and bypassed at level three pursuant to W. Va. Code §18-29-4(c). Appeal was madeto level four on July 14, 1994, and an evidentiary hearing was held at the Grievance Board's Charleston, West Virginia office, on August 31, 1994. The record was held open, upon request by the Logan County Board of Education (hereinafter Board), until receipt of the deposition taken of its former Transportation Director. The parties were given until April 24, 1995,

to submit post-hearing briefs in support of their positions. As of that date, the case became mature for decision.

At the beginning of the 1994-1995 school year, the Board reorganized its bus operators' bus routes in the area of the county serving Chapmanville, West Virginia. As a part of this reorganization and at the end of the 1993-1994 school year, certain drivers signed a waiver allowing the Board to change their routes for the upcoming year. As a result of this reorganization of bus runs, some runs were significantly increased by both time and distance while others were decreased or only changed minimally. The reorganization also resulted in fewer bus runs for the 1994-1995 school year. Ultimately, those employees who did not consent in writing to a change in their bus routes and some of the employees who did consent, were placed on administrative transfer and assigned different routes for the 1994-1995 school year than they had the previous year.

Grievants contend that the changed runs held by the employees referred to in the statement of grievance constituted "newly created positions" under W. Va. Code §18A-4-8b, and therefore, should have been posted for competitive bid. They contend thatthese runs at issue were "newly created" because significant changes were made to them. They assert that if these runs had been posted then they would have bid upon them and received them pursuant to their seniority, and therefore, they would not have been subject to transfer for the 1994-1995 school year. In an attempt to meet their burden of proof in this case, Grievants presented the testimony of the five bus operators referred to in the statement of grievance to establish that their previous 1993-1994 bus routes had been substantially changed for the 1994-1995 school year. The Board argues that the five drivers in question agreed to have their routes changed, either slightly or significantly, and therefore, the runs did not have to be posted by law.

Grievants and Respondent make their respective arguments based upon an interpretation of two specific, but different code sections. W. Va. Code §18A-4-8a(7), states as follows:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Also, W. Va. Code §18A-4-8b, states that

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the

> school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluations of past service.

Further, this Code section goes on to state that service personnel positions of employment or jobs must be filled by competitive posting. This language is as follows:

> Boards shall be required to post and date notices of all job vacancies of established or newly created positions in conspicuous working places for all school service employees to observe for at least five working days.

This Board has, on numerous occasions, interpreted the above cited language of Code §18A-4-8b to stand for the proposition that a board of education may not make significant changes to a bus driver's bus route, either in terms of the distance driven or the number of students served, without having first obtained that driver's consent. In other words, the very essence of a bus route, i.e., the miles driven and stops made, has been determined to be the bus driver's schedule. Here, Grievants are contending that at least five of the bus routes originating out of the Chapmanville area have been significantly changed and that this change transformed those five positions into newly created "positions of employment or jobs" which should have been competitively filled on the basis of qualifications, seniority and evaluations of past service.

Here, the Undersigned is not presented with the familiar argument that one's bus route or schedule has been significantly altered without consent, and therefore, the change in schedule must be rescinded. Interestingly, Grievants' argument is that the Board's attempt to comply with Code §18A-4-8 resulted in it ultimately violating Code §18A-4-8b by not treating the busdrivers' schedule changes as newly created runs and then posting them for competitive bid. However, this statutory provision relied upon by the Board was not applicable in this situation, as the change in schedule did not occur during the school year. The real issue involves only an interpretation of the language of Code §18A-4-8b.

The record is far from clear as to the events which transpired leading to this grievance. The Board determined in the spring of 1994 that a need existed for it to reconfigure most of the bus routes serving the Chapmanville area. The then-current Transportation Director, Ted Mattern, and other administrators had a meeting with the bus drivers in that area to apprise them of the decision to reconfigure the bus routes. The drivers were asked to sign an agreement signifying that they were

not opposed to having their runs changed. Not all of the bus drivers signed this agreement. Apparently then, the Board went through the normal process detailed under W. Va. Code §18A-2-7 with regard to the transfer of school personnel, and placed all of the bus drivers on the transfer list for the upcoming 1994-1995 school year. (See footnote 1) At the beginning of this school year, Grievants discovered that they had been assigned routes outside of the Chapmanville area and filed the instant complaint.

The legal question presented is whether a board of education may "reorganize" or "reconfigure" its bus routes prior to thebeginning of a school year, and then "assign" those routes to its drivers at the beginning of the next school year without being required to post the routes for competitive bid.

This Grievance Board addressed a similar scenario as early as 1986. In Miller v. Kanawha Co. Bd. of Educ., Docket No. 20-86-351-1 (Dec. 18, 1986), the Administrative Law Judge was presented with the issue of whether a change in location of a certain program within the county, which directly resulted in a change in the bus route for the driver who served the students in that program, amounted to the creation of a new position which required posting. The ALJ recognized that a change in the destination of a school bus run cannot, in and of itself, be the determinative factor as to whether a new position has been created. The ALJ concluded that "in the event a new program is added for which there are no existing transportation arrangements it is considered a new run to be posted." Id., at p. 4.

In Gemmer v. Wood Co. Bd. of Educ., Docket No. 91-54-274 (Dec. 23, 1991), the board of education discontinued an educational program at one of its schools, and subsequently, reduced the number of aides at that school by one. The existing aides were reassigned the remaining duties of this aide position which was eliminated. The grievant was in the position eliminated and she filed a grievance contending that the other positions should have been posted for her to bid. The administrative law judge held that the service personnel position of aide is neither a site-based nor program-based position and that the board of education was free todetermine if any of the vacant aide positions were to be posted. It was found that the total number of aide positions within the county remained unchanged, and therefore, there was no requirement that any of the positions be posted. Gemmer must stand for the proposition that new duty assignments may be given to an employee without transforming that employee's position into a newly created one.

Finally, this Grievance Board recently held in Payne v. Fayette Co. Bd. of Educ., Docket No. 94-

10-144, (Sep. 28, 1994), that

> A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require the elimination of some service personnel jobs. (Citation omitted).

In Payne, an employee in the position of crew leader retired and the board assigned those duties to another employee as opposed to posting and filling the vacated position, thereby eliminating the position. The grievant contended that the vacated position had to be posted. The administrative law judge concluded that it was not a violation of Code §18A-4-8b for the board to eliminate the position and assign its duties to other employees. In other words, the ALJ recognized that certain job duties may be given to an employee by assignment and not all newly imposed job duties rise to the level of a "position" under Code §18A-4-8.

However, the Undersigned is also aware of various cases issued by this Grievance Board standing for contrary propositions. In Alston v. Kanawha Co. Bd. of Educ., Docket No. 89-20-273 (Sep. 27,1989), the board of education, due to school closings, significantly changed the bus runs stemming from the Charleston garage, added five additional runs, and posted all of these runs within its Charleston garage. Grievant filed his claim contending that the runs should have been posted county-wide. In granting the grievance, the administrative law judge held that the twenty-five runs created at the Charleston terminal as a result of the school closings and consolidations constituted "job vacancies" within the meaning of Code §18A-4-8b.

In both Lucas v. Lincoln Co. Bd. of Educ., Docket No. 90-22-419 (May 20, 1991), and Cowger v. Webster Co. Bd. of Educ., Docket No. 92-51-348 (Mar. 12, 1993), the respective boards of education acted in a manner similar to the Board in this case. At the end of a particular school year, the boards of education decided to reconfigure the entire set of bus routes for the upcoming school year. The boards placed all of the drivers on administrative transfer and posted all of the runs which were revised. The grievants in both of these cases argued that the runs should not have been posted pursuant to the provisions of Code §18A-4-8b because the reconfiguration did not result in newly created positions being established. It was determined in both cases that the boards of education had acted consistent with the spirit and purpose of Code §18A-4-8b in posting the bus routes for bid. Inherent in these rulings is the proposition that a change in a bus route necessarily gives rise to a

"newly created" position under Code §18A-4-8b.

Finally, in Francis v. Logan Co. Bd. of Educ., Docket No. 93-23-346 (Dec. 29, 1993), the issue of when a position can be classified as "newly created," in the context of a summer school position, was addressed. (See footnote 2) Here, the board of education reduced the number of bus routes from three the previous year to two runs for the year in question. The grievant, an aide assigned to help with the transportation of students, contended that the reconfiguration of the bus runs resulted in newly created positions being created which should have been posted. The administrative law judge agreed with the grievant and held that the two bus runs were newly created positions; therefore, the aide positions were, likewise, newly created positions which were required to be posted.

Obviously, there are two lines of cases decided by this Grievance Board as to whether reconfigured bus routes necessarily give rise to newly created positions which must be filled by posting and competitive bid pursuant to Code §18A-4-8b. This Board's express holdings in Miller and Gemmer, and those implicitly made in Payne, directly conflict with the holdings in Alston, Lucas, Cowger and Francis. The legal issue at the heart of this matter needs revisited.

In the case at hand, no positions of employment or jobs, either newly created or vacant, became available to post as a direct result of the Board's reconfiguration of the bus runs within the Chapmanville area. The Board simply exercised its discretion to make duty assignments under Code §18A-2-7, to its currently employed bus operators, consistent with the duties contemplated for that type of position. The Board has the same number of employment positions after the reconfiguration as it had before, with the only difference being that some employees have been transferred from one job site to another.

It is determined that the clear and unambiguous language contained within the hiring and posting provisions of Code §18A-4-8b at issue herein do not mandate that particular duty assignments within a job classification must be posted each time an assignment of duties given to the incumbent within that classification is changed. No positions of employment or newly created job opportunities were created by the Board's reconfiguration of the bus drivers' 1993-1994 routes. The only time that a duty assignment might convert an existing position into a newly created position would be when the nature of the duty assignment is outside the statutory definition of the service personnel position in question. This clearly did not occur in this case.

Based upon the language of W. Va. Code §18A-4-8b, it is hereby determined that this Grievance

Board's previous decisions in Alston v. Kanawha Co. Bd. of Educ., Docket No. 89-20-273 (Sep. 27, 1989), Lucas v. Lincoln Co. Bd. of Educ., Docket No. 90-22-419 (May 20,1991), Cowger v. Webster Co. Bd. of Educ., Docket No. 92-51-348 (Mar. 12, 1993) and Francis v. Logan Co. Bd. of Educ., Docket No. 93-23-346 (Dec. 29, 1993), to the extent that they each stand for the proposition that a board of education's assignment of additional duties, or duties inconsistent with those previously assigned to a currently employed service employee, transforms that employee's position into a newly created position which must then be filled by competitive bid, are hereby expressly overruled. Also, the holdings in Miller v. Kanawha Co. Bd. of Educ., Docket No. 20-86-351-1 (Dec. 18, 1986), Gemmer v. Wood Co. Bd. of Educ., Docket No. 91-54-274 (Dec. 23, 1991) and Payne v. Fayette Co. Bd. of Educ., Docket No. 94-10-144, (Sep. 28, 1994) are hereby affirmed.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. See, W. Va. Code §18-29-6.

2. A county board of education has discretion to make job assignments and transfers pursuant to W. Va. Code §18A-2-7.

3. County boards of education are required to fill "service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel" competitively under W. Va. Code §18A-4-8b. In order to notify potential applicants of the existence of these positions of employment, county boards of education must post and date noticesof all job vacancies of established or newly created positions for bid.

4. Pursuant to W. Va. Code §18A-4-7a, a county board of education may change a bus driver's bus route, either minimally or substantially, without transforming that bus operator's position into a newly created position which must then be filled pursuant to W. Va. Code §18A-4-8b.

5. Grievants have failed to establish by a preponderance of the evidence a violation of W. Va. Code §18A-4-8b.

Therefore, this grievance must therefore be **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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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ALBERT C. DUNN, JR.

Administrative Law Judge

September 25, 1995

Footnote: 1Grievants have not argued that Code §18A-2-7 has been violated by the Board.

Footnote: 2W. Va. Code §18-5-39, states, in pertinent part,

> *An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any preceding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code. (Emphasis added.)*