CLAUDE J. DYER, et al.,

Grievants,

v.

LINCOLN COUNTY BOARD OF EDUCATION,

Docket No. 95-22-494

Respondent,

and

RANDY TONEY,

Intervenor.

D E C I S I O N

This is a grievance by Claude J. Dyer, Roger McCallister and Herbert Adkins (Grievants) alleging that the Respondent Lincoln County Board of Education (LCBE) violated an internal written policy regarding removal of substitute bus operators who are not available to work on an as-needed basis. This grievance was initiated at Level I on October 3, 1995. (See footnote 1) Grievants' immediate supervisor was without authorityto grant the relief requested, and they appealed to Level II where a hearing was conducted by LCBE Superintendent Dallas Kelley on October 23, 1995. Superintendent Kelley denied the grievance, and Grievants by-passed Level III in accordance with W. Va. Code § 18-29-4(c), appealing to Level IV on November 9, 1995. On February 7, 1996, the undersigned granted Intervenor status to Randy Toney in accordance with W. Va. Code § 18-29-3(u). Following a continuance which was granted for good cause, an evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on March 29, 1996. This matter became mature for decision on

April 30, 1996, upon receipt of post-hearing arguments from all parties in accordance with the agreed briefing schedule.

DISCUSSION

Grievants all complain that LCBE failed to comply with its own written policies by not removing Intervenor from the substitute bus operator list. The evidence of record indicates that LCBE has adopted Policy 8-15.01 entitled "Guidelines for Substitute Service Personnel." It is not clear when this policy was initially issued, but it was last revised in July 1990, prior to any of the events at issue. The following portions of the policy are pertinent to resolution of this grievance:

> 1. A limited number of substitutes for each classification will be approved.
>
> 2. The approved substitute must report to work when called unless prevented from doing so by personal illness or other just cause.
>
> 3. All approved substitutes must be willing to serve at all schools within the designated attendance areas and in other attendance areas as the needs demands (sic).
>
> 4. When a substitute service employee has accumulated three (3) consecutive refusals to work not covered by one of the following, the individual's name shall be removed from the substitute list unless a waiver is granted by the Superintendent:
>
> Acceptable reasons for refusals are:
>
> 1. A written doctor's statement for personal
>
> illness.
>
> 2. Death in the immediate family[.]
>
> 5. Substitutes will normally be called between 5:00 a.m.-8:30 a.m. for day work. Substitutes for evening shift work will be called as soon as the need is known. When a substitute is unavailable for work for an extended period of time, other than medical, he or she shall not be considered for re-employment. If a substitute is unavailable or the phone is unanswered for five (5) consecutive times, this will be considered excessive and the substitute's name will be removed from the substitute list and not contacted for the remainder of the year.

Grievants contend LCBE failed to comply with this policy because Intervenor was allowed to remain on the substitute list while unable to drive a school bus due to an injury received while working for another employer. During part of this time, Intervenor worked for LCBE as a contract

employee, transporting students to and from the school bus stop nearest their home over roads that were not accessible by a conventional school bus. Intervenor received approval from his doctor to drive the contract run, while apparently still receiving workers' compensation for being medically disqualified from operating a commercial vehicle or a school bus.

Despite these irregularities, Grievants did not establish through competent evidence that Intervenor was ever actually called to work as a substitute bus operator three consecutive times and declined. LCBE Assistant Superintendent Donna Martin explained that LCBE does not remove employees from the substitutelist when they are receiving workers' compensation. Further, LCBE makes no distinction between employees who are injured while working for LCBE or another employer. Thus, LCBE did not call Intervenor to substitute, apparently believing he was medically unable to operate a school bus.

In a grievance of this nature, Grievants have the burden of establishing each essential element of their grievance by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). A county board of education must abide by the regulations it promulgates, notwithstanding that those regulations bestow rights upon employees which are not provided by statute. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). See Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). It does not appear that LCBE granted any substantive rights to employees in Grievants' situation when it adopted Policy 8-15.01. The policy simply provides guidelines for LCBE to apply when eliminating substitute employees who are not available to work for LCBE due to matters within their control.

Moreover, LCBE's interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable. See Watts v. W. Va. Dept. of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996). See also W. Va. Dept. ofHealth v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993). In this regard, LCBE explained that it treats someone receiving workers' compensation benefits as having the equivalent of a written doctor's statement for purposes of applying Policy 8-15.01. Not only is this a reasonable interpretation of its policy, LCBE's

position may be compelled by the anti-discrimination provision of the West Virginia workers' compensation law. See W. Va. Code § 23-5A-1; Powell v. Wyoming Cablevision, 403 S.E.2d 717 (W. Va. 1991); McMillen v. Bd. of Trustees, Docket No. 92-BOT-341 (Nov. 12, 1993). See generally Cokeley, West Virginia's New Workers' Compensation Provision: The Road to Court is Paved With Good Intentions, 94 W. Va. L. Rev. 725 (1991-92).

W. Va. Code § 23-5A-1 provides: "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." Ms. Martin's testimony noted that LCBE believed it was required to maintain Intervenor's status as a substitute while he was receiving workers' compensation benefits. While Intervenor was working for LCBE as a contract employee during part of this time, that circumstance does not override the fact that he was receiving workers' compensation benefits at the same time. In these circumstances, the undersigned is unable to conclude that LCBE violated Policy 8-15.01 when it concluded that Intervenor would have "just cause" for not reporting to duty when called. Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriately made in this matter.

FINDINGS OF FACT

1. Grievants are employed by Lincoln County Board of Education (LCBE) as substitute school bus operators.

2. As of July 1990, LCBE had adopted Policy 8-15.01 containing "Guidelines for Substitute Service Personnel" including the following language pertinent to this grievance:

> 1. A limited number of substitutes for each classification will be approved.
>
> 2. The approved substitute must report to work when called unless prevented from doing so by personal illness or other just cause.
>
> 3. All approved substitutes must be willing to serve at all schools within the designated attendance areas and in other attendance areas as the needs demands (sic).
>
> 4. When a substitute service employee has accumulated three (3) consecutive refusals to work not covered by one of the following, the individual's name shall be removed from the substitute list unless a waiver is granted by the Superintendent:
>
> Acceptable reasons for refusals are:

1. A written doctor's statement for personal illness.

2. Death in the immediate family[.]

5. Substitutes will normally be called between 5:00 a.m.-8:30 a.m. for day work. Substitutes for evening shift work will be called as soon as the need is known. When a substitute is unavailable for work for an extended period of time, other than medical, he or she shall not be considered for re-employment. If a substitute is unavailable or the phone is unanswered for five (5) consecutive times, this will be considered excessive and the substitute's name will be removed from the substitute list and not contacted for the remainder of the year.

3. Intervenor has been employed by LCBE as a substitute bus operator since June 1992. Shortly after the start of the 1992-93 school year, LCBE hired Intervenor to transport students from their residence to the nearest bus stop using his personal vehicle in the capacity of a private contractor.

4. While working for another employer in 1993, Intervenor suffered an on- the-job injury for which he was awarded workers' compensation benefits from June 1993 to September 1994.

5. Intervenor was advised by his treating physician that he could resume driving a car in September 1993, but he was medically excused from driving a school bus until August 1995. Based upon his physician's approval to drive a car, LCBE permitted Intervenor to continue driving his contracted run during the 1993-94 school year.

6. LCBE's Superintendent did not issue Intervenor a written waiver from the provisions of Policy 8-15.01, as authorized in section 4.

7. LCBE considers employees receiving workers' compensation disability benefits as being medically excused under Policy 8-15.01, making no distinction between employees who sustain injuries while working for LCBE, and those who are injured while working for another employer.

CONCLUSIONS OF LAW

1. Grievants have the burden of establishing each essential element of their grievance by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). 2. A county board of education must abide by the regulations it promul gates, notwithstanding that those regulations bestow rights upon employees which are not provided by statute. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Hall v. Mingo County Bd. of Educ.,

Docket No. 95-29-529 (Mar. 28, 1996); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). 3. Grievants failed to demonstrate by a preponderance of the evidence that LCBE violated Policy 8-15.01 by failing or refusing to remove Intervenor from the substitute bus operator's list between September 1992 and August 1995. See Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94- PEDTA-448 (Mar. 31, 1995).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Lincoln 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 Administra tive 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 ap propriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: June 28, 1996

Footnote: 1

At Level IV, Respondent's counsel alleged that at least some portion of this Grievance was not timely. Counsel acknowledged that this issue was not raised at Level II. W. Va. Code § 18-29-3(a) specifically states: "Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing." Consistent with this statutory mandate, this grievance is considered timely filed. See Trickett v. Preston County Bd.of Educ., Docket No. 95-39-413 (May 8, 1996).