

LINDA LANGMYER

v. Docket No. 95-35-565

OHIO COUNTY BOARD OF EDUCATION

DECISION

Grievant Linda Langmyer, a school bus aide with Respondent Ohio County Board of Education (OCBE), advanced the following complaint to level four on or about December 18, 1995:

Violation of 18A-4-8[b] and 18A-4-16. Both were violated by not posting [a] job opening for . . . [a] pre-school [sic] run and . . . [not placing] the most senior person for said job opening. I am seeking for this job to be posted and back pay from October 2, 1995, when [the] job . . . started; if I am entitled to this job.

At the brief January 31, 1996 level four hearing, the parties merely augmented the evidence adduced at the level two proceeding. [\(See footnote 1\)](#) The case became mature for decision on March 4, 1996, upon receipt of the last of the parties' written post- hearing fact/law proposals.

Based on all matters of record, including the testimony and evidence adduced at both the level two and level four proceedings, the following findings of fact are made.

Findings of Fact

1. Grievant has been employed continuously as a school bus aide on Bus No. 54 since November 2, 1987.
2. All of OCBE's aides must work an eight-hour day, including school bus aides. At the beginning of the 1995-96 school year, Grievant's morning duties on her school bus lasted from approximately 6:30 a.m. until 10:00 a.m., and her afternoon duties lasted from 2:00 p.m. until 5:30 p.m.
3. Although OCBE attempts to assign each full-time school bus aide enough duties to fill the aide's eight-hour workday, it is not always possible. Nevertheless, the aide receives full-time wages.
4. OCBE's bus operators can earn extra wages by driving a supplemental, extracurricular bus run at times other than their regular morning and afternoon runs. These assignments are offered to

bus operators who do not already have a supplemental run (mid-morning/early afternoon or after school), on the basis of seniority.

5. Previously, on one or more occasions, Bus No. 54's driver had a supplemental run, and, in keeping with OCBE's practice, Grievant was assigned at the time to serve as the aide for the supplemental run on Bus No. 54. An aide who serves on a supplemental run will benefit to the extent that, if her total day's work extends beyond eight hours, she receives overtime wages.

6. Effective the end of the 1994-95 school year, two OCBE bus operators who drove special education buses, Bus Nos. 7 and 10, retired. Special education buses have an aide "monitor" on duty to tend to the needs of the students, and aides also serve on supplemental preschool runs for handicapped children. 7. On June 26, 1995, OCBE posted an "Announcement of Vacancies" which included openings for two special education bus drivers, for Bus Nos. 7 and 10, and also noted an "Anticipated Pre-School [sic] Based on Need," for Bus No. 10. The positions were filled.

8. In early October 1995, a preschool handicapped run was added to the schedule of Bus No. 7. This run was needed to take home the morning preschool handicapped students at the end of their school day around 11:45 a.m., and to pick up another group of students for their afternoon session of school.

9. The aide permanently assigned to Bus No. 7 was assigned to serve as the aide during the preschool run. The assignment pushes her work hours over forty hours per week, and she receives overtime wages for the overage.

11. When the 1995-96 school year began, Grievant did not have enough assigned work to fill an eight-hour workday. She worked from seven hours and five minutes per day to seven hours and twenty-seven minutes per day.

12. Grievant has enough time between her morning and afternoon assignments on Bus No. 54 to serve as the preschool aide on Bus No. 7. If Grievant held the aide assignment for the preschool run on Bus No. 7, her work week would exceed forty hours, and she would earn overtime wages.

13. According to OCBE's seniority list, compiled in September 1995, twenty-two of OCBE's aides, primarily classroom and building aides, have more seniority than Grievant. However, Grievant is more senior than the school bus aide permanently assigned to Bus No. 7 and more senior than every other bus aide who does not already have a supplemental assignment.

The Applicable Law

W.Va. Code §18A-4-16 specifies that extracurricular assignments are "any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis." The statute continues, The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with . . . [18A-4-8b] . . . : Provided, That an alternative procedure for making extracurricular and supplemental . . . assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two-thirds of the employees within that classification category of employment.

W.Va. Code §18A-4-8b requires a county board of education to post all vacant or newly-created service positions. Additionally, the statute requires that the county board fill service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment . . . and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title . . . that relates to the promotion or vacancy.

Discussion

This grievance poses for the first time the question whether a school bus aide permanently assigned to a specific bus is entitled to remain as the aide on the bus if the bus operator assigned to the bus receives an extracurricular, supplemental run for which an aide is required. Grievant simply argues that the preschool run bus aide assignment at issue is a vacant extracurricular position under W.Va. Code §18A-4-16 that must be posted and filled according to the competitive bidding procedure outlined in Code §18A-4-8b. OCBE raises several arguments which, if accepted, would obviate the need to reach the question posed above.

1. The standing argument.

OCBE first maintains Grievant lacks standing "to contest the award of the run to the most senior

driver and his assigned aide" because she has not been harmed, and because she failed to prove that the schedules of the twenty-one more senior building aides could not accommodate the preschool bus aide assignment. OCBE's Brief at 1. Grievant never alleged any wrongdoing relative to the award of the preschool run to the bus driver on Bus. No. 7, so she has not improperly challenged his employment status, as OCBE claims. Furthermore, Bus No. 7's aide was never awarded the preschool run aide's position as the result of a competitive bid under §18A-4-8b.

Despite the fact that Grievant works less than eight hours a day and still receives full-time wages, she definitely is harmed monetarily if, by being denied an opportunity to serve as an aide on the preschool route, she is precluded from earning overtime wages. Moreover, it is highly unlikely that the building or classroom aides working a full time, eight-hour day during normal business hours could have time in their midmorning schedule to serve as Bus No. 7's bus aide. OCBE's standing argument is not persuasive.

b. The longstanding practice argument.

OCBE also asserts that "the award of the supplemental run followed posting of a bus driver vacancy notice and was in accordance with [OCBE's] long standing and previously accepted practices[.]" OCBE's Brief at 1-2. Again, Grievant does not contest the "award" of the preschool run to Bus No. 7's bus operator as a supplemental, extracurricular driving assignment. OCBE's "practice" of permitting a bus aide to remain with her regularly assigned bus and bus operator when that operator receives a supplemental run, and not posting the aide's position for the supplemental run, has never been formally "approved both by the county board of education and by an affirmative vote of two-thirds of the employees within that classification category [aide] of employment." OCBE's longstanding practice argument fails.

c. The burden of proof argument.

Lastly, OCBE urges that Grievant has not met her burden of proving that its actions in this matter were violative of W.Va. Code §§18A-4-8b and 18A-4-16. Without question, OCBE failed to post a newly-created, extracurricular bus aide position for consideration by those aides in the school system who had opportunity, time-wise, to fill the position. Further, OCBE made no argument that Bus No. 10's permanently assigned aide needed more work to fill her eight-hour per day work schedule. In fact, it was Grievant's work schedule that was not full in October 1995. That Grievant would incidentally receive some overtime wages should she serve as the preschool aide on Bus No. 7 is not a compelling reason to deny her the opportunity to hold the run, and OCBE did not specifically raise

such an objection. OCBE's argument that Grievant failed to prove her allegations in this grievance has absolutely no merit.

In summary, Grievant is entitled to relief in this dispute. Given the circumstances in this case, there was no compelling reason for a school bus aide permanently assigned to a specific bus to be retained on the bus as the aide for a supplemental position when the bus operator assigned to the bus began to drive the preschool supplemental run for which an aide was required. OCBE did not cite any legitimate reason for not posting the supplemental bus aide job, and it never claimed that by switching an aide on the school buses, a disruption of operations would result.

In addition to the factual and legal determinations contained in the foregoing discussion, the following formal conclusions of law are made.

Conclusions of Law

1. A grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33- 88-130 (Aug. 19, 1988).
2. School boards are required to properly post and fill any extracurricular positions for school service personnel. W.Va. Code §§18A-4-8b and 18A-4-16.
4. Under Code §18A-4-16, a school board may not deviate from posting and hiring requirements for extracurricular service positions unless an alternate method has been approved by the board and the affected employees within the classification title.
5. Grievant has proven a violation of W.Va. Code §§18A-4-8b and 18A-4- 16, in that OCBE failed to post and properly fill an extracurricular bus aide position for a supplemental preschool run, and an alternate method to fill such positions had never been properly established.
6. Grievant established by a preponderance of the evidence that she is more senior than the school bus aide improperly assigned to the bus aide position at issue, and that it is more likely than not she would be the successful applicant should the job be posted for competitive bid.

Accordingly, the grievance is **GRANTED**, and OCBE is Ordered to properly post and fill the bus aide position for the supplemental preschool run on Bus No. 7. If Grievant wins the bid for the job, OCBE is further Ordered to pay her all appropriate back wages from the day the assignment began in October 1995.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

NEDRA KOVAL

Administrative Law Judge

Date: March 12 , 1996

[Footnote: 1](#)

Adverse decisions were rendered at the lower grievance levels on November 1, 1995 and December 8, 1995, respectively. The transcript of the December 5, 1995, level two hearing is part of the record in this case.