

CHARLES KESSEL

v. Docket No. 95-12-341

GRANT COUNTY BOARD OF EDUCATION

DECISION

Grievant, Charles Kessel, employed by the Grant County Board of Education (Board) as a bus operator, filed a level one grievance on May 25, 1995, in which he alleged that his bus run was incorrectly placed on the transfer list, that he was not given the opportunity to retain his route, and the runs listed on the transfer list were not open to all drivers. The grievance was not resolved at levels one or two. The Board waived consideration at level three and the matter was advanced to level four on August 7, 1995. An evidentiary hearing was conducted October 23, 1995, and the grievance became mature for decision with the submission of proposed findings of fact and conclusions of law, and responses thereto, by December 6, 1995.

The facts of this matter are as follows. In the spring of 1995, the Board determined that the transportation patterns throughout the county should be reorganized and reconfigured. As a result of a review by Assistant Superintendent and Director of Transportation W. Kent Hudgins, two bus operators were terminated as part of a reduction in force and the bus routes in place during the 1994- 95 school year were reorganized. After consulting the State Department of Education, legal counsel, and an employee organization, it was determined that a fifty percent modification of an existing route constituted a substantial or significant change requiring the assignment be posted. Eight of the routes, including that held by Grievant, met the "fifty percent rule" and the bus operators assigned those routes were placed on the transfer list on March 28, 1995. In April, the drivers on the transfer list selected runs on the basis of seniority. Grievant, the bus operator with the least seniority, accepted bus Run #1 - Dorcas Area, on April 20, 1995.

Grievant sets forth several arguments in support of the claim that his route was improperly posted. First, his prior route did not meet the “fifty percent rule.” Grievant opines that although his route had been significantly shortened, it remained clearly identifiable as the one he had performed during the 1994-95 school year. More specifically, his route during the 1994-95 school year was 31.4 miles in length, one way. During the revision, 19.9 miles were deleted and approximately 5 miles were added. Grievant opines that only 38% of his route was deleted leaving 62% intact, or, in the alternative, approximately 78% of the current route consists of his prior assignment.

Grievant next argues that W.Va. Code §18A-4-8b provides that a board of education may not prohibit an employee from continuing to hold a position prior to the effective date of that provision or thereafter. Grievant asserts that the provision was originally intended to notify boards that the posting and filling of positions applied only to vacant or newly created positions, and, in essence, created an interest for employees in retaining their positions as long as they exist and the employee remains employed.

Citing Mullins, et al. v. Logan County Bd. of Educ., Docket No. 94-41-112 (Sept. 25, 1995), Grievant argues that the posting of the bus routes is not required, even where significant changes in the routes have occurred. In the alternative, should the eight revised runs be determined “new” assignments, Grievant argues that they should have been posted county-wide and filled on the basis of seniority, qualifications, and evaluations of past service, in compliance with W.Va. Code §18A-4- 8b, rather than just offering them to the eight bus operators on the transfer list.

The Board asserts that its actions were properly implemented within its discretion because the routes were consistently evaluated in a manner which was not arbitrary or capricious. Unlike the calculations used by Grievant, the Board considered only the mileage changes on existing runs and not what territories might be added in the future when applying the “fifty-percent rule.” The Board also cites Mullins, noting that it states only that a board is not required to post significantly changed bus runs, but that it does not prohibit a board from such postings.

The Board also asserts that the transfers were made in compliance with W.Va. Code §§18A- 2-7 and 18A-4-8b. It notes that the various procedural requirements, such as a county-

wide posting, were fulfilled. The assignments were made on the basis of seniority, and the record contains no evidence to indicate that qualifications or evaluations were at issue.

In addition to the substantive issues, the Board argues that the grievance was not timely filed. The Board notes that Grievant was placed on the transfer list on March 28, 1995, but did not file a complaint at that time. Even if Grievant is given until April 20, 1995, the date on which he accepted the new run, or until April 28, when he met with the Transportation Director to discuss the situation, the grievance was not filed within the fifteen day period set forth in W.Va. Code §18-29-4(a). Grievant does not dispute the Board's calculations but argues that the delay was attributable to his good faith effort to informally resolve the matter.

The grievable event in this case occurred when Grievant was placed on the transfer list on March 28, 1995. This action by the Board put the Grievant on notice that his assignment for the upcoming school year would change. Further, this was no surprise to Grievant because Mr. Hudgins discussed the potential changes with all the bus operators in late January 1995. Even considering that school was out of session for one week in April for spring break, and that Grievant was absent for two and one-half days that month, approximately thirty-three and one-half working days passed between the grievable event and May 24, 1995, when the grievance was filed.

W.Va. Code §18-29-4(a)(1) provides:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Clearly, the Board made a decision on March 28, 1995, which affected Grievant's employment. All subsequent meetings and responses, written or oral, were merely additional confirmations of the Board's decision and not the event upon which the claims are based. Rose, et al. v. Raleigh County Bd. of Educ., Docket Nos. 94-41-296, 314 (Nov. 29, 1994).

Equitable theories, including estoppel, may be applied to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). However,

there is no evidence in the present case which would support the application of such equitable principle. On the contrary, the record reflects that the Grievant's decision to delay filing was based solely on his belief that the Board would reconsider its decision. There is no evidence that any Board administrator made statements or took actions which encouraged such a belief. The Grievant's hope that the Board would reconsider or retract its decision is insufficient justification for a delay in filing of nearly two months. Neither may Grievant prevail upon the merits of this grievance. First, his 1994-95 bus run was properly determined subject to the "fifty percent rule." Mr. Hudgins based his calculations on Grievant's November 1994 monthly report which stated the length of Grievant's run to be sixty-three miles. Because Grievant's run, one way, was thirty-one and one-half miles, the deletion of 19.9 miles changed more than fifty percent of the route. Mr. Hudgins stated that he did not consider miles added, and that factor cannot now be made part of the calculation at Grievant's suggestion.

Second, Grievant correctly cites W.Va. Code §18A-4-8b, in part, to state a "county board of education may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter." This statute does not apply to the instant situation, however, because Grievant continues to retain employment in the same position or job he held in 1994-95. Recognizing that school service personnel laws and regulations must be strictly construed in favor of the employees they were designed to protect, Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), this provision cannot be read so broadly as to mean that a bus operator's route cannot be amended to meet the changing needs of the school system.

Grievant's third argument, that the eight positions should have been posted county-wide and filled on the basis of seniority, qualifications, and evaluations of past service, appears to be moot. Grievant Exhibit 9, admitted at level four, is a Notice of Vacancy dated April 3, 1995, on which the eight bus runs were listed. The Notice states that the "runs will be assigned by seniority to bus operators on the transfer list." Typically, in a reduction in force all bus operators could bid on the runs, with those drivers on the transfer list allowed to bid on the remaining runs. This procedure was not strictly followed; however, the Board's assertion that no one was prohibited from applying for the positions is undisputed. In June 1995, Mr. Hudgins secured releases from the remaining busoperators, stating that they were not

interested in applying for the positions listed on the April posting. Due to the specialized licensure required of bus operators, it is unlikely that any other employee would have been able to bid into one of the positions. The eight positions were awarded on the basis of seniority; therefore, any error committed by the Board was harmless.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Charles Kessel has been employed as a bus operator by the Grant County Board of Education at all times pertinent to this grievance.

2. During the 1994-95 school year the Board administrators determined that the transportation system must be reorganized and reconfigured to more adequately meet the needs of the school system.

3. In March 1995 the Board approved a recommendation to eliminate two bus operator positions and to reconfigure the county-wide transportation pattern. Eight runs which were changed by more than fifty percent were considered new assignments and posted as vacancies. The bus operators who were previously assigned these runs were placed on the transfer list.

4. The bus operators were reassigned to the new runs on the basis of seniority.

5. Because Grievant was the bus operator with the least seniority he was offered, and accepted, the last remaining run.

6. After meeting with the Transportation Director, the Superintendent, and the Board, Grievant filed a level one complaint on May 24, 1995.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations of complaints constituting a grievance by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant has failed to prove that the run he was assigned in 1994-95 did not meet the "fifty percent rule" applying the same criteria as that used by the Board, or that it was improperly determined a new run after its reconfiguration.

3. Grievant has not been deprived of the opportunity to remain in the position of bus operator in violation of W.Va. Code §18A-4-8b.

4. Any violation of the W.Va. Code §18A-4-8b provisions which require that positions be posted county wide and filled on the basis of seniority, qualifications, and evaluations of past service, committed by the Board during the reassignment of those bus operators placed on the transfer list to the posted positions was harmless error.

Accordingly, the grievance is DENIED.

March 30, 1996

SUE KELLER

SR ALJ