

MALINDA TOLLIVER, .

Grievant, .

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V. . DOCKET NUMBER: 95-29-475

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MINGO COUNTY BOARD OF EDUCATION, .

Employer. .

DECISION

Grievant, Malinda Tolliver, filed this grievance on September 25, 1995, against her employer, the Mingo County Board of Education (Board), pursuant to West Virginia Code §§18-29-1, et seq., claiming as follows:

Grievant, a regularly-employed bus operator, contends that Respondent violated of [sic] West Virginia Code §18A-2-7 by eliminating her assignment and transferring her to a new assignment without complying with the notice and hearing requirements of said provision of law. Grievant seeks reinstatement to the route assigned to her in the 1994-1995 school year. She also seeks compensation for one day when she reported to her old assignment location, but was not allowed to make her old run.

The claim was denied at the lower levels of the grievance procedure and appeal to level four was made on November 2, 1995. Anevidentiary hearing was held on January 17, 1996, at the Grievance Board's Charleston, West Virginia office. The case became mature for decision on February 8, 1996, after the parties' submission of proposed findings of fact and conclusions of law.

The material facts at issue are not in dispute and shall be set forth below as appropriately made findings:

Findings of Fact

1. Grievant is employed as a bus operator by the Board.
2. During the 1994-1995 school year, Grievant was assigned a bus route in and around the town of Gilbert, West Virginia. She served Gilbert High School, Gilbert Grade School and Cline Grade School.
3. In 1994-1995, Grievant drove a small, handicapped-equipped bus with an automatic transmission.
4. In the summer of 1995, Grievant injured herself in a non- work-related accident. She was not able to return to duty with the Board until after the beginning of the 1995-1996 school year.
5. Sometime in July or August, 1995, Transportation Director Bill Kirk determined that many of the students Grievant served during 1994-1995 would not be transported to school on a small, handicapped-equipped bus during the 1995-1996 school year. This decision was based upon the changing needs of the students, changes in their Individual Education Plans (IEPs) and/or the county's change to a middle school concept. The students that were still required to ride a small, handicapped-equipped bus were assigned to the other driver in the county who drove such a bus the preceding year.
6. At the beginning of the 1995-1996 school year, Grievant's duties were performed by a substitute employee.
7. On September 18, 1995, Grievant met with Mr. Kirk to discuss her return to work and assignment for the school year. Grievant was assigned to drive a small, handicapped-equipped bus in an area around Beech Creek and Matewan, West Virginia, serving Matewan Middle and Matewan Grade Schools.
8. On September 19, 1995, Grievant was told not to drive the route referred to above, using a small bus, but instead, was assigned to drive a regular size school bus.
9. Grievant was released by her physician to return to work on September 20, 1995. On this date, she reported to Gilbert Grade School and expected to drive a small, handicapped-equipped bus in that area. She was notified by Mr. Kirk that the only assignment he had for her then was in and around the Beech Creek-Matewan area on a regular-sized bus. Grievant did not drive on this date.
10. Grievant was off work from September 20, 1995, through September 25, 1995, on sick leave.

11. On September 26, 1995, Grievant was assigned to drive a regular size bus on a route in and around Justice, West Virginia, serving the same schools she had served during the 1994-1995 school year.

12. Grievant never drove the route assigned to her in the Beech Creek-Matewan area. 13. Grievant was not notified in the spring of 1995, pursuant to W. Va. Code §18A-2-7, that she was going to be transferred, effective the beginning of the 1995-1996 school year.

14. The Board does not segregate the county in areas or regions for the assignment of bus routes to its bus operators. Many bus operators park their buses at their homes, at the schools they serve, or at places along the routes they drive.

Discussion

Grievant contends that any change in a bus operator's assigned bus route that requires the driver to serve different schools in a different geographic region of the county amounts to a transfer of the driver, and therefore, cannot be valid unless the procedural requirements of W. Va. Code §18A-2-7 are followed. Grievant contends that the change in her driving assignment constituted a transfer but she was not given transfer notice pursuant to Code §18A-2-7. As relief for this alleged violation, she requests that she be assigned the same duties, i.e., bus type, bus route and stops, she was assigned during the 1994-1995 school year. [\(See footnote 1\)](#) She also requests payment for September 26, 1995, the day she reported to Gilbert Grade School but did not drive a bus. The Board argues that Grievant has failed to establish that it has abused its discretion, or that she is entitled to any particular bus route or bus assignment. It further asserts that she has suffered no harm because the bus route she had and the students she served during the previous year are not assigned to a single, handicapped bus run during the current school year.

W. Va. Code §18A-2-7 states in pertinent part:

The superintendent, subject only to the approval of the board, shall have the authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, except that for the school year one thousand nine hundred eighty-nine--ninety only, the superintendent shall have until the fourth Monday of April to provide an employee with such written notice. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the

superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, except for the school year one thousand nine hundred eighty-nine--ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred ninety. At the hearing, the reasons for the proposed transfer must be shown. (Emphasis added)

This statute provides school personnel with the procedural guarantees of notice and a hearing prior to being transferred, along with providing specific time frames within which to fulfill these requirements. The question here is whether the Board transferred Grievant by virtue of changing her bus assignment and route. There is no question that if she were transferred, the procedural requirements of this Code section were not followed. Because the term "transfer" has not been defined by the Legislature, its common and ordinary meaning must be relied upon in interpreting and applying Code §18A-2-7. See, Goff v. Merrifield, 446 S.E.2d 695 (W. Va. 1994).

In general, a transfer occurs when an employee is moved from one work site or job to another. Ordinarily, transfers do not involve changes in one's time schedule or assignment of job duties within one's classification. Further, what action results in a transfer may be different for an itinerant employee than for other employees. This Grievance Board has previously recognized that because a bus operator's duties are inherently itinerant in nature, a change in one's driving schedule (taken to mean a change in one's driving assignment) does not constitute a transfer under Code §18A- 2-7. Conner v. Barbour County Bd. of Educ., Docket No. 93-10- 543/544 (Jan. 1, 1995); citing, Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). The same analysis was used in Dunleavy v. Kanawha County Bd. Of Educ., Docket No. 20-89-009 (Feb. 23, 1989), when it was held that a school psychologist had not been transferred by virtue of the board having assigned him to work at different schools. It was recognized that the grievant was already an itinerant employee whose job duties had not changed nor was he required to produce more work. It is significant in these types of cases that the nature of the employees' jobs is to travel and they do not have a fixed work site; therefore, they cannot be transferred by changing the geographic area in which they work. When a transfer occurs must be based upon a case-by-case analysis.

Bus operators are employed by county boards of education to drive school buses and to serve the schools in the various counties. There is no statutory authority to support the proposition that bus operators are hired to drive specific routes or to make specific stops along those same routes. It is essential for the efficient operations of our schools that bus driving assignments be flexible to meet yearly, monthly or even daily changes in the student population's transportation needs. Many bus

operators, in various counties, are different from most other service personnel employed by county boards in that they do not have working sites in buildings of working stations. See, Terek v. Ohio County Bd. Of Educ., Docket No. 91-35-366 (Mar. 6, 1992). In fact, notice is taken that many bus operators in the State start and end their work day at their own homes. It does not appear logical to conclude that such an employee could be transferred from his current work site to another simply by changing the specific roads he drives during the day, when his work site is the county in which he works.

Here, the evidence shows that Grievant has been required to drive a standard size school bus in an area she calls the Justice area, which is an area encompassed within the same general location as the Gilbert area she serviced the previous year. She serves the same schools as she did in the 1994-1995 school year. This is the only driving area she has serviced since her return to work on September 26, 1995. This change by the Board in the route she is required to drive does not amount to a transfer of her position from one work site to another. Therefore, it was not required to give her written notice and to conduct a hearing, upon her request, in the Spring of 1995, before making a change in her work or duty assignment. It would be absurd to impose such a restriction on a board of education when it could never truly know what its total transportation needs would be for the succeeding school year at such an early date.

It is recognized that Grievant does not wish to drive a full- size bus with a manual transmission because it is more difficult, in general, and because she has been diagnosed as having carpal tunnel syndrome in her right hand. [\(See footnote 2\)](#) However, a change in a bus operator's assignment from one bus type to another also does not result in that driver being transferred. It seems, given the general description of the position of bus operator in Code §18A-4- 8, that a bus operator should be qualified and able to drive any type of bus assigned to them. Grievant's representative made it clear at hearing that the issue in this case is not whether Grievant can perform the essential functions of her job.

Finally, Grievant requests payment of wages for September 20, 1995. The record suggests that she showed up at the wrong school but did not perform any work because she did not intend to honor the work assignment given to her the prior day. Grievant would be unjustly enriched if she were to be paid her daily salary for this day, especially when it arguably appears that her actions amounted to insubordination by going to a school included in her old assignment when she had been told her

previous route did not exist. Grievant's request for relief on this issue is denied.

The foregoing discussion of the facts of the case is hereby supplemented by the following appropriately derived conclusions of law:

Conclusions of Law

1. Grievant bears the burden of proving the facts supporting her claims by a preponderance of the evidence. See, W. Va. Code §18-29-6.

2. W. Va. Code §18A-2-7 requires a board of education to notify an employee "on or before the first Monday in April if he is being considered for transfer or to be transferred. . . ." Consistent with the common usage of the term "transfer," one may only be transferred when a change is made in his assigned work site.

3. Bus operators employed by county boards of education hold positions that, by their very nature, are itinerant. Therefore, a change in their driving assignment does not always result in a transfer occurring. A case-by-case analysis of where the bus operators work site is located, is necessary for the decision. Conner v. Barbour County Bd. Of Educ., Docket No. 93-10-543/544 (Jan. 1, 1995); citing, Titus v. Wood County Bd. Of Educ., Docket No. 92-54-023 (Apr. 30, 1992). 4. Grievant has failed to prove by a preponderance of the evidence that she is entitled to be paid for September 20, 1995.

5. Grievant has failed to prove that she was transferred based upon the change in her bus route. Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

ALBERT C. DUNN, JR.

Administrative Law Judge

May 31, 1996

[Footnote: 1](#)

It is obvious from the record that Grievant is as much concerned with the bus she is assigned as she is with the route she is assigned. Grievant testified that she has difficulty driving a regular-sized bus with a manual transmission, even though she can drive such a bus and has done so since the filing of her grievance. There is no issue in this case as to whether Grievant is physically able to perform the normal duties of a bus operator or whether the Board should be required to, or has already, made reasonable accommodations for Grievant's injury.

[Footnote: 2](#)

The record reflects that Grievant has been able to drive such a bus since the time she filed her grievance.