ROY C. DAMRON, .

Grievant, .

.

.

.

V. . DOCKET NUMBER: 95-29-517

.

.

.

.

MINGO COUNTY BOARD OF EDUCATION, .

Employer. .

DECISION

Roy C. Damron, Grievant, filed this grievance pursuant to West Virginia Code §§18-28-1, et seq., at level one on October 11, 1995, against his employer, the Mingo County Board of Education (Mingo), alleging as follows:

> My afternoon “run” was taken by an “older” driver without being posted as per [W. Va. Code §]18A-4-8b and [W. Va. Code §]18A-2-7. I've asked for my job back and had [a] hearing with [the] Transportation Director. Out of eleven jobs in Matewan, Mine was the only one changed. I request my regular run back.

Prior to filing the grievance at level one, Grievant had requested an informal conference with the Transportation Director, Bill Kirk, on September 20, 1995. The grievance was denied at the lower levels and appeal was made to the Grievance Board on November 22,1995. An evidentiary hearing was held at the Grievance Board's Charleston, West Virginia office on February 6, 1996. The case became mature for decision on March 12, 1995, at the conclusion of the briefing schedule.

At the level four hearing, Mingo alleged that the grievance was untimely filed because Grievant

did not request the informal conference within the statutory time limit set forth by W. Va. Code §18-29-4. Grievant contends that his request for an informal conference was timely presented to Mr. Kirk's office. Based upon the discussion below, it is determined that the grievance was timely filed.

W. Va. Code §18-29-4(a)(1) states:

> 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.

A timeliness defense is an affirmative defense that the employer must establish by a preponderance of the evidence. The evidence establishes that the 1995-1996 school year began on September 1, 1995, and this was the first day Grievant was required to make the afternoon portion of his run that he contests. Therefore, this is determined to be the date on which the grievable event occurred. Grievant testified that he called the office of his immediate supervisor, Bill Kirk, on September 20, 1995, and requested an informal conference. Mr. Kirk was not in his office on that dateso Grievant asked his secretary to note he had requested said conference. The informal conference was held sometime after this initial request.

It is recognized that Code §18-29-4(a)(1) does not require that a grievant initiate an informal conference by submitting a written form to his employer. What is required is that the conference be scheduled. Here, it is found that Grievant substantially complied with the statutory requirements for the initial processing of a grievance by attempting to schedule a conference with his supervisor on September 20, 1995. See, Duruttya v. Board of Education of County of Mingo, 382 S.E.2d 40 (W. Va. 1989). As Code §18-29-1 states, the grievance “procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose.” Grievant's request of September 20, 1995, was made within fifteen days of the date of the occurrence of the event on which the grievance is based. Therefore, the claim was timely filed and the merits of the claim shall be addressed.

The material facts in the case are not in dispute and are set forth below as the Undersigned's appropriately made findings:

Findings of Fact

1. Grievant is a bus operator employed by Mingo.

2. For the 1995-1996 school year, Mingo added various middle schools to its organization of schools. Also, it changed its highschools so that they operated on a block schedule that increased the instructional time for the students.

3. Because of the changes described above, the transportation patterns for the schools and the bus routes in many of Mingo's geographic areas needed revised. The middle school students were to be released when the elementary school students were released, while the high school students were to be let go later than in the previous year and after the other students.

4. During the spring of 1995, Mingo notified all of its bus operators that their bus routes and schedules would be changed for the upcoming school year.

5. In August 1995, Bill Kirk met with the bus operators and attempted to work out changes in the county's bus routes that would adapt to the change in the delivery of the students and their release from the schools. During more than one meeting, Mr. Kirk let the bus operators work out the changes in their bus routes among themselves, as had been the practice in the past. Ultimately, Mr. Kirk approved the route changes agreed upon by the drivers.

5. On August 30, 1995, Grievant attended a meeting with the bus operators in his area to discuss bus route assignments for the beginning of the school year. At this meeting, Ms. Blankenship, another bus operator, expressed her desire to Grievant that theyswitch the afternoon portions of their runs. Grievant did not object to this change and it was approved by Mr. Kirk. (See footnote 1)

6. Beginning September 1, 1995, Grievant's afternoon bus run was changed from that which he had performed the previous year.

7. Grievant later decided that he did not want to accept a change in his bus driving assignment and initiated a grievance on September 20, 1995, by requesting an informal conference with Mr. Kirk.

Positions of the Parties

Grievant contends that he had the right at the beginning of the 1995-1996 school year to retain the position or job he held during the 1994-1995 school year. He relies upon the following language of Code §18A-4-8b for this argument: “The 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.” He contends that the change in his p.m. bus run

changed the nature of his position or job; therefore, he has been denied continued employment in his position. He contends that the only way Mingo could have made the change in his route was to consider his 1995-1996 bus run as a newly created position and then post it for competitive bid. (See footnote 2) Finally, Grievant contends that Mingo should not have allowed his bus route to be changed in the manner that it was changed. He avers that it was an abuse of Mingo's discretion to allow another driver to simply take his run. (See footnote 3)

Mingo argues that Grievant's job or employment position is not comprised of his bus route. It contends that it has the discretionary authority to make changes in a bus operator's bus run by changing the operator's duty assignment. It does not agree that the change in Grievant's p.m. run resulted in a newly created position that should have been posted and competitively filled. Further, it maintains that it did not abuse its discretion given the change in the structure of its schools. Based upon a consideration of the parties' arguments, it is found that Grievant's claims are without merit.

First, Grievant's argument relying upon W. Va. Code §18A-4-8b is not supported by the specific language he cites. This Grievance Board stated long ago that the language Grievant relies upon demonstrated the Legislature's intent to "preserve the status quo and to make it clear that county boards of education were not required to post all service positions once the amendment [to this Code section in 1983] became effective." Lucas v. Lincoln County Bd. of Educ., Docket No. 90-22-419 (May 20, 1991), p. 9. In any event, even if this provision was meant to apply to changes in dutyassignments which would, arguably, require the posting of the "position", that issue has also been decided by this Grievance Board.

The same factual scenario was addressed in another case that recently came out of Mingo County, when a bus operator's afternoon run was switched with another driver for the 1995-1996 school year. In Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996), the Administrative Law Judge cited to an earlier case styled Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sep. 25, 1995), wherein it was held that

> [P]ursuant to W. Va. Code §18A-4-7a, (See footnote 4) 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 that must then be filled pursuant to W. Va. Code §18A-4-8b.

Id., p. 12. In Mullins, as for the issue of what constitutes a "job" it was stated,

> In the case here, 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. . .
>
> 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 classificationis changed. No positions of employment or newly created job opportunities were created by the Board's reconfiguration of the bus drivers' 1993-1994 routes.

Id. at p. 10.

In precise terms, a board of education is authorized to hire a bus operator to perform services contemplated by the definition of that classification in Code §18A-4-8. Once hired into the employment position or job of bus operator, the board is authorized, pursuant to its discretionary authority, to assign work duties to that employee. The duties assigned do not become the job or position.

Grievant's employment with the Board was not terminated because of the change in his bus route in violation of Code §18A-4- 8b nor was his position changed into a newly created employment opportunity that should have been posted for bid. Grievant's position or job is that of bus operator, the geographic route he drives and the schools he serves do not control his employment relationship with Mingo. To interpret any provision of Code §§18A- 4-8, 18A-4-8b, or 18A-2-7 to support such a proposition would lead to an absurd result as the nature of the position of bus operator is itinerant and constantly changing to allow the county boards of education to operate the schools effectively and efficiently, within the best interests of the students. (See footnote 5) This case is a primeexample of the problems that such a reading of these Code sections would present.

Mingo changed the organizational stucture of its schools and educational offerings and, as a result, the transportation of students was affected. It must be free to make changes in the work assignments of its bus operators to adjust to the changing needs of the students. In fact, Mr. Kirk testified that the bus routes were still being changed after the first of the year to better accommodate the students. To conclude that a change in a bus route requires the position to be posted and competitively filled would simply create a procedural quagmire that would place an unnecessary burden on the boards of education. Further, because bus driver positions are itinerant, by nature,

arguments persist about whether the change is slight or substantial. Such issues serve no useful purpose and take up the valuable time of both the employees and agents of the boards. Finally, there is no statutory provision which suggests that such an analysis is necessary. Grievant has also failed to prove that Mingo abused its discretion by allowing the drivers to have input into the nature of the changes in their bus routes. Given that the operators themselves would be in the best position to judge whether currently assigned routes allow them to serve the various schools effectively, giving them input in the change makes common sense. Further, Mr. Kirk is ultimately responsible for approving the runs. It is doubtful that he would allow a driver to change his route solely for the benefit of that driver and not the goals of the transportation department. Even though the drivers were asked to "work out" their own routes, Grievant did not object or voice a concern about the change Ms. Blankenship proposed to him, although he had the opportunity to do so. (See footnote 6) Based upon the evidence of record, it is determined that Grievant has not established by a preponderance of the evidence that Mingo abused its discretion.

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

Conclusions of Law

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

2. Grievant has failed to establish a violation, misinterpretation or misapplication of W. Va. Code §§18A-4-8b. Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sep.25, 1995); Miller v. Kanawha County Bd. of Educ., Docket No. 20-86- 351-1 (Dec. 18, 1986).

3. Grievant has failed to establish that Mingo abused its discretion in changing the afternoon portion of his bus route or that the manner in which said change was achieved was, likewise, an abuse of discretion.

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

April 30, 1996

Footnote: 1

In essence, Grievant testified that this other driver has more seniority than he; therefore, he believed that she had a "right" to choose what job she wanted. He testified that he believed if he did not consent to Ms. Blankenship's request, it would be assigned to her by Mr. Kirk anyway based upon her greater seniority.

Footnote: 2

It is noted that Grievant does not request this as a form of relief, as he believes he would not receive the "position" if itwere to be posted because of his seniority.

Footnote: 3

Grievant has abandoned any claim alleging a violation of W. Va. Code §18A-2-7.

Footnote: 4

W. Va. Code §18A-4-7a, 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 . . ." (Emphasis added).

Footnote: 5

In was noted both in Conner and the instant case, that Mingo had provided all of its bus operators notice of transfer pursuant to W. Va. Code §18A-2-7, in the spring of 1995, to enable it to make the changes in duty assignments for the 1995-1996 school year that it deemed necessary. Notice is taken that many county boards of education perform this task so that their employees may not successfully complain that they were transferred, effective thenext school year, by changes made to their bus route. In Conner it was correctly noted that the change in the grievant's bus route (changing his p.m. run) was not so significant as to constitute a transfer pursuant to Code §18A-2-7. The same conclusion has recently been made in Tolliver v. Mingo County Bd. of Educ.,Docket No. 95-29-475 (Apr. 30, 1996), wherein it was held that "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 constitute a transfer." Id., p. 9, citing, Conner v. Barbour County Bd. of Educ., Docket Nos. 93- 10-543/544 (Jan. 1, 1995); Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). Generally speaking, a transfer involves the change in one's work site, and the work site for a county bus operator is made up of the roads in the county.

Footnote: 6

Perhaps if Grievant did not believe that his "job" amounted to the bus route he drove, he would have been more inclined to express his concerns on this issue.