

MARIAN S. CONNER, .

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Grievant, .

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v. . Docket No. 95-29-476

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MINGO COUNTY BOARD OF EDUCATION, .

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Respondent. .

DECISION

Marian S. Conner (Grievant), a regular Bus Operator employed by the Respondent Mingo County Board of Education (MCBE), complains that her employer violated W. Va. Code § 18A-4-8b by assigning the afternoon bus run which she preferred to a less senior Bus Operator without a competitive posting. A Level II hearing was conducted on October 19, 1995, and a decision denying the grievance was issued by the Superintendent's designee, John Fullen, on October 23, 1995. Grievant elected to waive Level III and appealed to Level IV on October 31, 1995. A Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on December 11, 1995. Thereafter, this matter became mature for decision on January 18, 1996, following receipt of written post- hearing arguments from the parties.

BACKGROUND

The pertinent facts in this matter are not in dispute. Accordingly, the following Findings of Fact have been developed from the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant has been employed by the Mingo County Board of Education (MCBE) as a regular School Bus Operator for over 12 years.
2. For the past 3 years, Grievant has been assigned to the Williamson bus garage. During 1994-

95, she drove the "Rawl - Lick Creek" morning and afternoon bus runs.

3. During the 1994-95 school year, Grievant received a timely notice of transfer, pursuant to W. Va. Code § 18A-2-7, to be effective at the beginning of the 1995-96 school year.

4. MCBE conducted two inservice meetings with bus operators prior to the beginning of the 1995-96 school year. At the second meeting, which Grievant did not attend as she was then working for another employer, MCBE's Transportation Director, William Kirk, assigned Grievant to the Rawl - Lick Creek run, and George Evans to the "East End" run.

5. Mr. Kirk's decision to assign Grievant to the Rawl - Lick Creek run was based, at least in part, on representations from another employee attending the inservice meeting that Grievant would prefer that route.

6. In addition, Mr. Kirk considered that assigning Grievant to the Rawl - Lick Creek run would allow her to start and end her route close to her residence, thereby reducing mileage and fuel consumption.

7. On the day following the inservice meeting described in Finding of Fact Number 4, Grievant spoke with Mr. Kirk, and advised him that she would prefer the East End run as her afternoon run.

8. Had Grievant been assigned the East End run, her bus and that operated by Mr. Evans (who would then take the Rawl - Lick Creek run) would pass each other empty at the end of the day, accumulating additional "dead head" mileage.

9. Grievant has greater seniority than Mr. Evans.

10. The runs at issue were not posted by MCBE to be filled competitively under W. Va. Code § 18A-4-8b.

DISCUSSION

In grievances that are not disciplinary in nature, grievants have the burden of proving the allegations in their complaints by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-8b requires county boards of education to "make decisions affecting promotion and filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." Further, in order to notify potential applicants of the existence of such positions, county boards of education must post and date notices of all job vacancies of established

or newly created positions for bid. A separate Code provision, § 18A-2-7, provides authority to school superintendents, subject to board approval, to transfer employees, provided that certain procedural requirements are fulfilled. See State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

Although MCBE issued a timely transfer notice to Grievant in accordance with W. Va. Code § 18A-2-7, it does not appear that the changes in Grievant's bus route were so significant as to constitute a transfer. See Burgess v. Raleigh County Bd. of Educ., Docket No. 95-41-268 (Sept. 28, 1995); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Therefore, the outcome of this grievance is controlled by this Grievance Board's decision in Mullins v. Logan County Board of Education, Docket No. 94-23-283 (Sept. 25, 1995). There, in a factual scenario similar to the instant grievance, the administrative law judge concluded:

[N]o 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, with the only difference being that some employees have been transferred from one job site to another.

Mullins, supra, at 10.

Here, Grievant complains that, had the bus run she desired been posted in accordance with § 18A-4-8b, as the most senior bus operator, she would have been the successful applicant. However, inasmuch as the number of bus runs and bus operators employed by MCBE did not change, no vacant or newly created positions existed. In these circumstances, Mr. Kirk's rationale for assigning the Rawl - Lick Creek run to Grievant and the East End run to Mr. Evans was neither arbitrary or capricious.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994); Runyon v.

Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

2. Pursuant to W. Va. Code § 18A-2-7, 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 which must then be filled pursuant to W. Va. Code § 18A-4-8b. Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995).

4. Grievant failed to establish by a preponderance of the evidence that MCBE violated W. Va. Code § 18A-4-8b. See Id.

Accordingly, this Grievance is **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.

LEWIS G. BREWER

Administrative Law Judge

Dated: March 28, 1996