JOHN MESSER,

Grievant,

v. Docket No. 96-29-513

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Messer, is a regularly employed bus operator, and he alleges the Mingo County Board of Education ("MCBOE") violated W. Va. Code § 18A-4-15 when it did not allow him to substitute or "step up" into an vocational assignment during the absence of a regularly assigned bus operator. Grievant requests as relief, the wages he would have received if he had been assigned the run during the absence of the other employee, and all other benefits. The grievance was denied at all lower levels. Grievant appealed to Level IV, and a Level IV hearing was held on February 5, 1997. This case became mature for decision on March 5, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

After a careful review of the entire record, the Undersigned makes the following Findings of Fact.

Findings of Fact

1. Sometime during the 1996-1997 pre-school orientation, Grievant, a regular bus operator, requested the extracurricular bus run of Mr. Al Perry, who was off work due to a non-compensable injury.

2. Mr. Bill Kirk, the Director of Transportation, denied this initial request for two reasons. One, Mr. Perry was expected to return to work within a few days, and two, the placement of Grievant in the position would require him to take Mr. Perry's entire run, including the morning and afternoon runs, not just the extracurricular run; thus, not only would Mr. Perry's students have a new driver, so would Grievant's students.

3. This request was also denied because it was made just before the beginning of the

school year, and two days before school started, Mr. Kirk was required to change all the drivers' schedules and starting times at the request of the Superintendent. Mr. Kirk did not have time to examine the impact Grievant's requested changes would create for the students on a long-term basis.

4. Mr. Richard Evans, a substitute, was assigned Mr. Perry's entire run.

5. On September 3 or 4, 1996, Grievant again requested to "step up" into Mr. Perry's extracurricular position. He was told by Mr. Earl Spence, the Assistant Director of Transportation, that drivers more senior than he had requested the extracurricular run,and these drivers must be asked first if they wanted the position before Grievant could be considered. (See footnote 1)

6. The two more senior bus operators were asked if they still wanted to "step up" into Mr. Perry's entire position, as they also could not make Mr. Perry's run and keep their morning and afternoon runs. Upon hearing this information, both employees indicated they were no longer interested in this position.

7. When Grievant heard no further word and saw Mr. Evans remained in the position, he filed this grievance on September 24, 1996.

8. Grievant was asked on October 7, 1996, if he would take the entire run in question, as Mr. Evans was having some difficulty controlling the teenagers on the bus, and MCBOE was receiving complaints from parents and principals. Grievant accepted and held Mr. Perry's position until he returned, and Mr. Evans was assigned to Grievant's run.

9. The additional payment Mr. Perry received for this vocational run was $30.00 a day.

Discussion

MCBOE argues this grievance is untimely filed as Grievant knew about Mr. Perry's absence on or about August 22, 1996, but did not file this grievance until September 24, 1996. W. Va. Code § 18-29- 4(a) states a grievance must be filed:

> within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen daysof 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 discovery rule exception on this Code Section states the time in which to invoke the

grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance. Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990). In this case, Grievant was first told Mr. Perry would be returning very shortly, and was later told the position must be offered to other, more senior, bus operators. He was never informed Mr. Perry would be off another four to six weeks, or that the other bus operators turned the position down. This grievance cannot be seen as untimely filed. Grievant filed this grievance when he saw Mr. Evans remained in the position, and no more than fifteen days after he was told other drivers must first be considered.

The next issue to resolve is whether Grievant was entitled to "step up" into Mr. Perry's position pursuant to W. Va. Code § 18A- 4-15. This Code Section discusses the employment of substitutes and states:

> [I]f there are regular service employees employed in the same building or working station as the absent employee
>
> and who are employed in the same classification category of employment, such regular employees shall first be offered the opportunity to fill the position of the absent employee in a rotating and seniority basis with the substitute then filling the regular employee's position.

This Grievance Board has ruled on this issue several times. In Terek v. Ohio County Board of Education, Docket No. 91-35-366(Mar. 6, 1992), ALJ Nedra Koval held "[t]he proviso for `job swapping,' described in W. Va. Code § 18A-4-15, is only triggered when both of the employees, . . . are employed and assigned to perform their duties in a common working site, that is, `in the same building or working station.'" "Bus operators whose primary duties consist of pre-servicing their own buses and driving their own bus routes generally do not share a common working site with other bus operators in the performance of their duties, as contemplated by W. Va. Code § 18A-4-15." Id. Accordingly, "[r]egularly-hired bus operators have no right under W. Va. Code § 18A-4-15 to substitute for an absent driver or to drive any part of the ongoing driving assignments or routes of absent regularly- employed bus operators." Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993). Thus, Grievant was not entitled to "step up" into Mr. Perry's position.

This ruling, however, does not end the analysis. Vincent stated a board of education does not have to offer job swapping to bus operators, but it may. Inherent in a decision to allow job

swapping or "stepping up" is the requirement that this process be handled fairly. What appears to have happened in this case is, two bus operators, who expressed interest in Mr. Perry's position, were offered the position. After they refused, the position should have been offered to Grievant. This did not happen. It is clear if he had been offered the position he would have taken it; thus, he is entitled to the $30.00 a day, he would have earned if he had received the position. The next issue is what date should Grievant have been offered the position. It is clear from the record, that the two, more senior employees had not been offered the position on September 3, 1996; however, it appears that MCBOE knew by this date that Mr. Perry would be absent for some time, and that it was willing to allow a more senior employee to "step up" into the position. Thus, allowing for a day or two to offer the position to the other two employees, then to Grievant, and then arrange for Mr. Evans to fill Grievant's position, the date Grievant should have been placed in the position is September 5, 1996. (See footnote 2)

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A grievant, in a non-disciplinary action, has the burden of proving his case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. "The proviso for `job swapping,' described in W. Va. Code § 18A-4-15, is only triggered when both of the employees, . . . are employed and assigned to the perform their duties in a common working site, that is, `in the same building or working station.'" Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992).

3. "Bus operators who primary duties consist of pre- servicing their own buses and driving their own bus routes do not share a common work site with other bus operators in the performance of their duties, as contemplated by W. Va. Code § 18A- 4-15." Id.

4. "Regularly-hired bus operators have no right under W. Va. Code § 18A-4-15 to substitute for an absent driver or to drive any part of the ongoing driving assignments or routes of absent regularly-employed bus operators." Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993).

5. Although a board of education does not have to allow bus operators to privilege of

"job swapping" or "stepping up", if it does allow this exchange, this process must be carried out in a nondiscriminatory manner.

6. MCBOE's decision to fill the position initially with a substitute, is not an arbitrary and capricious act, given the data MCBOE had concerning Mr. Perry's health, and the confusing status of the bus routes just before and shortly after the start of school.

7. MCBOE's decision to offer the route in question to the more senior bus operators first, complies with the provision of the statute.

8. MCBOE acted in an arbitrary and capricious manner when it did not offer Mr. Perry's route to Grievant after it had offered it to the more senior drivers.

Accordingly, this grievance is GRANTED.

MCBOE is directed to pay Grievant $30.00 a day for every day he should have started the run from September 5, 1996, to the day he began making the run, October 7, 1996. MCBOE is also encouraged to formulate a policy relating to the "job swapping" provisions contained in W. Va. Code § 18A-4-15, if it plans to continue allowing bus operators to "step up" into other drivers' positions.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 31, 1997

Footnote: 1

Apparently, these other drivers had also made their requests prior to the start of school.

Footnote: 2

The Undersigned Administrative Law Judge realizes this date and relief is not and cannot be exact, but believes the fashioning of this relief falls within the powers allowed under W. Va. Code § 18-29-5(b).