ROGER STEINER, SR., ET AL.,

Grievants,

v. DOCKET NO. 96-32-379

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) are employed by the Morgan County Board of Education (Respondent). They allege:

> Respondent posted two Bus Operator postions as a "Driver- County Vehicle" on an as needed basis at a rate of $12.00 for the a.m. run and $12.00 for the p.m. run. Grievants contend that this posting violated West Virginia Code §§18A-4-8 and 18A-4-8a.

Level IV grievance form.

Grievants seek "reposting of the position as a half-time Bus Operator position if it continues to exist and back pay and benefits for Mark Miller who performed one of the assignments."

Grievants were denied relief at Levels I and II on February 26, 1996, and August 22, 1996, respectively. Pursuant to W. Va. Code §18-29-4(c), Grievants appealed the Level II decision to Level IV on September 3, 1996. A Level IV evidentiary hearing was scheduled for January 3, 1997, and the day before the hearing the undersigned Administrative Law Judge by Grievants' counsel that the parties had agreed to submit the case on the record developed at the lower levels of the grievance procedure, with the right to simultaneously exchange rebuttal submissions (to proposed findings of fact and conclusions of law) postmarked by February 10, 1997. This case became mature for decision on February 12, 1997, with the receipt of Respondent's rebuttal submission.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievants are employed by Respondent as bus operators.

2. Grievant Iva Lou Beddow was the only Grievant to testify.

3. Sometime after the 1995-96 school year started, Respondent learned that an additional student needed transportation to school. This student required a bus equipped with a wheel chair lift.

4. To accommodate the student's special education and related needs, Respondent chose to transport some special education students who normally rode a special education bus equipped with a wheel chair lift by county car, and to transport the child needing the lift by the specially equipped bus. Tr. 14.

5. The county car used was a station wagon, and was required to pass the same inspection standards and contain the sameequipment as a school bus, including a first aid kit. Tr. 22.

6. On January 23, 1996, the school system posted a “Position Vacancy” for the position created by transporting some special education students in the county car.

7. Respondent withdrew the position vacancy posting within a week because the State Department of Education required the position be filled by a person holding a Class C (See footnote 2) driver's license. The position was not filled pursuant to the January 23, 1996, posting. Tr. 15.

8. On January 30, 1996, a second posting for the position was made which changed the qualifications of the position to include a Class C driver's license. Tr. 15, Ex. 2.

9. The salary for the position was posted at $12.00 per a.m. run (7:30 a.m. to 8:40 a.m.), and $12.00 per p.m. run (3:00 p.m. to 4:00 p.m.). Ex. 2.

10. The position was for the period of January 30, 1996, through June 13, 1996; five days a week. Ex. 2 and Tr. 18.

11. Grievant Miller, the successful applicant for the a.m. run, was the only regular bus operator who applied for the morning run position. No regular drivers applied for the afternoon position.

12. Grievant Miller was the only grievant who did not have a conflict between his existing bus schedule and the a.m. run. Tr. 20-21 and 23-24. 13. Each Grievant's existing bus schedule, including Grievant Miller's, conflicted with the p.m. run. Tr. 20-21 and 23-24.

14. There were no applicants for the p.m. run. Curtis Perry, a substitute bus operator, who is not a party to this grievance, was awarded the p.m. run after Transportation Supervisor Larry Barney,

called all of the substitute bus operators. He was the only substitute interested in the p.m. run. Tr. 16-17.

15. Both the a.m. and p.m. runs in question were eliminated at the end of the 1995-1996 school year. Tr. 17, and Ex. 2. 16. Grievant Miller did not appear at the Level II hearing.

17. The Level II Grievance Evaluator denied relief to Grievant Miller because "he failed to appear, testify or in any way pursue this grievance." Level II decision.

18. Grievant Miller did not withdraw his grievance.

DISCUSSION

Grievant Miller is the only Grievant who applied for one of the runs in question, and was the only Grievant without a conflicting schedule. (See footnote 3) Grievant Miller is the only Grievant withstanding (See footnote 4) to pursue this grievance, because the complaints of the other Grievants do not fall within the definition of grievance set forth in W. Va. Code §18-29-2(a). It provides, in pertinent part:

> "Grievance" means any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Emphasis added.

The record fails to contain any evidence that any of Grievants, except Grievant Miller, desired the positions in question regardless of the compensation offered or paid. Grievant Miller was the only affected employee. Therefore, the grievances of all of the Grievants, except Grievant Miller, are DENIED and DISMISSED.

The Level II Grievance Evaluator incorrectly denied the grievance of Grievant Miller. W. Va. Code §§18-29-1, et seq., does not mandate the appearance of a grievant at any step of thegrievance procedure. See Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996). If Grievant Miller chooses not to be present at a hearing, although he may be acting at his peril, he has that right, and the hearing may proceed without him. Evidence, other than testimony from Grievant

Miller, was produced on his behalf during the Level II hearing by his counsel. Grievant Miller's grievance should, and will, proceed on the evidence contained in the record.

W. Va. Code §18A-4-8a(1) provides, in pertinent part:

> The minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the "state minimum pay scale pay grade" and the minimum monthly pay and the minimum monthly pay for each service employee whose employment is for a period of three and one half hours or less a day shall be at least one-half the amount indicated in the "state minimum pay scale pay grade" set forth in this section: *Provided,* That on and after the first day of July, one thousand nine hundred ninety-four, the minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the "state minimum pay scale pay grade I" as set forth in this section, and the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one half the amount indicated in the "state minimum pay scale pay grade I" set forth in this section.

Counsel for Grievant Miller asserted in his proposed conclusions of law that:

> 2. West Virginia Code §18A-4-8a(1) provides that the minimum daily salary for a full time bus operator with zero years of experience shall be $56 plus any county supplement.
>
> 3. West Virginia Code §18A-4-8a(1) provides that the minimum daily salary for a one-half time bus operator with zero years of experience shall be $28 plus any county supplement.

However, W. Va. Code §18A-4-8a(1) fails to specify a daily rate of pay for either full time or half time bus operators, and there was no evidence to support counsel's assertion. Moreover, Grievant Miller failed to prove, by a preponderance of the evidence, the exact nature of his employment with Respondent. Grievant Miller is a “regular bus operator”. Without more facts, it is impossible to determine whether his grievance should be granted. Is Grievant Miller a regular full-time or part-time employee? If “regular” implies that he is a full-time employee, then is Grievant Miller asserting that he should be paid for one and a half days wages for each one day he works? If he is a regular part-time employee, is the rest of his shift during the a.m. hours? How many hours does Grievant Miller work on an average day?

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

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. Grievants, except Grievant Miller, failed to prove, by a preponderance of the evidence, that they were "affected employees" within the definition of grievance provided in W. Va. Code §18-29-2(a). 3. Grievant Miller has standing to proceed with his grievance.

4. W. Va. Code §§18-29-1, et seq., does not mandate the appearance of a grievant at any step of the grievance procedure. Although a grievant may be acting at his peril, he has the right not to appear for a hearing, and the hearing may proceed without him. See Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996).

5. Grievant Miller failed to prove, by a preponderance of the evidence, that he was entitled to the relief he sought.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Morgan 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 are 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.

DATED: 4/23/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

This case has twenty-one grievants: Roger Steiner, Sr., Iva Lou Beddow, Raymond Steiner, Michael Weaver, Mark Yost, Harold Fink, Jr., Donna Swaim, Richard Merica, John Muson, Jay DuVall, John Gue, Lester Weber, Sr., Barbara Roach, Pamela MacCumbee, Nancy Hendershot, Douglas Maconaughey, Mary Youngblood, Mary McClintock, Riley Ours, Stephen Qualis, and Mark Miller.

Footnote: 2

The transcript incorrectly refers to the classification required as "E" rather than "C".

Footnote: 3

Conclusion of Law number three in Teter v. Randolph County Bd. of Educ., Docket No. 95-42-553 (May 9, 1996), provides:

> *Implicit in the provisions ... governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by [Respondent]. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995).*

See Wall v. Wyoming County Bd. of Educ., Docket No. 95-55-157 (Aug. 29, 1995).

Footnote: 4

Conclusion of Law number 3 in Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996), provides:

> *Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy, and one person cannot prosecute a grievance on behalf of another person. [Cites omitted]*