BONNIE MANNS,

Grievant,

v. **DOCKET NO. 97-22-257**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

and,

RANDY TONEY,

Intervenor.

DECISION

This grievance was filed by Grievant Bonnie Manns on Friday, February 7, 1997, with Respondent Lincoln County Board of Education's ("LBOE") counsel, after LBOE awarded a posted temporary vacancy in a bus run to Intervenor Randy Toney. She asserted she had more seniority than Intervenor, stating:

> Randy Toney should be behind me. He was off on Workers' Compensation from Adams Trucking Co./not [f]rom the B.O.E. and he should not have kept seniority ahead from me.

Level I was bypassed, and this grievance was granted at Level II, without a hearing, on Tuesday, February 11, 1997, by Superintendent Dallas Kelley. Intervenor attempted to intervene immediately by placing his request to intervene in the mail on Monday, February 10, 1997. Intervenor was notnotified of the Level II decision. After making inquiry and learning of the Level II decision, he appealed it to Level IV, waiving Level III. (See footnote 1) The case was remanded to Level II for hearing, and that hearing was held on May 2, 1997, with Respondent placing the burden of proof upon Intervenor. A Level II decision was issued on May 15, 1997, by Charles S. McCann, Hearing Examiner, holding that he had no authority to allow intervention by Mr. Toney, and "it was incumbent upon [Mr. Toney] to timely intervene at Level III or to insist upon a Level III hearing." Intervenor

appealed the Level II decision to Level IV on May 27, 1997. A Level IV hearing was held on July 11, 1997.

The following Findings of Fact are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 2)

Findings of Fact

1. Intervenor has been employed by LBOE as a regular bus operator since October 17, 1995. 2. Grievant has been employed by LBOE as a regular bus operator since October 17, 1995.

3. On March 6, 1996, Intervenor suffered an injury on-the-job, as an LBOE employee, and was not able to return to work that school year. He filed a Workers' Compensation claim related to this injury, and the injury was found to be compensable. LBOE contested this claim.

4. On June 7, 1996, the tie in seniority between Grievant and Intervenor was broken by a coin toss. (See footnote 3) Present for the coin toss were Grievant, Intervenor, Assistant Superintendent Donna Martin, and two other observers. Intervenor won the coin toss, and from that point was more senior than Grievant.

5. At the beginning of the 1996-97 school year LBOE posted a list of all the bus runs, and the regular bus operators were allowed to choose runs by seniority. Grievant was allowed to select a run before Intervenor, indicating she was considered more senior.

6. Intervenor selected a run in the Duval area.

7. Shortly thereafter, Intervenor filed a grievance, arguing he was more senior than Grievant after the coin toss, and that LBOE had taken his seniority rights because he was on Workers' Compensation. As relief he requested to be placed ahead of Grievant on the seniority list.

8. On September 18, 1996, Assistant Superintendent Martin wrote to Intervenor, stating that after some research by LBOE's counsel, LBOE's understanding was that Intervenor's seniority over Grievant was established by the coin toss, and was not affected by his absence due to his injury. No formal decision was issued. Intervenor did not further pursue his grievance, believing the issue had been resolved in his favor. Grievant was not aware of Intervenor's grievance. (See footnote 4)

8. In late January 1997, a temporary vacancy was posted for a run in the Harts Creek area, near Intervenor's home. Grievant and Intervenor bid on the posted position, and it was awarded to

Intervenor on February 3, 1997.

9. Intervenor drove the Harts Creek run on February 5, 6, 7, and 10, 1997, and a half day on February 11, 1997. He had surgery on February 12, 1997, as a result of an injury suffered while working for another employer. He returned to work March 7, 1997, driving his regular bus run in the Duval area.

10. This grievance was filed on February 7, 1997.

11. On Friday, February 7, 1997, Intervenor heard that Grievant had filed this grievance. He immediately contacted his representative, who submitted a request to intervene in the grievance by placing the request in the United States mail, post-marked Monday, February 10, 1997.

12. This grievance was granted at Level II by Superintendent Dallas Kelley, on February 11, 1997, without a hearing. Among other things, the decision found that Intervenor had been off work "on Workers' Compensation for injuries from and credited to one Adams Trucking Company and not the Lincoln County Board of Education and thus this time is not to count toward his seniority." The decision further stated, "[t]his matter being resolved at this level does not preventMr. Toney from either filing a separate grievance protesting the above or from intervening herein and appealing this matter to either Level III or IV . . . ." Grievant did not appeal this decision.

13. The regular bus operator for the Harts Creek run returned from his leave of absence after the end of the 1996-97 school year.

14. The Harts Creek run takes one less hour to complete than Intervenor's Duval run, or two hours less each day. Intervenor traveled 31 miles in his personal vehicle to reach his bus in order to work the Duval run, which is 62 miles round-trip. Intervenor kept the bus at his home when he was working the Harts Creek run. From March 7, 1997, through June 4, 1997, Intervenor drove the Duval run 49 full days, (See footnote 5) and three half-days. When working full days he made two round trips from his home to reach the bus and back, and on half days he made one round trip. Intervenor travelled 6,262 miles using his personal vehicle in order to perform the Duval run from March 7, 1997, through June 4, 1997.

Discussion

Intervenor makes two arguments. First, he argues the issue raised by Grievant was resolved in a grievance he had filed, and Grievant's challenge in this grievance is a collateral attack upon the

settlement reached in his grievance, which is not allowed. Second, he argues the Level II decisiongranting this grievance was erroneous, as it was based upon a mistake of fact. LBOE argued Intervenor had to intervene at Level III, and could not waive that level and appeal the adverse Level II decision to Level IV. Grievant argued Intervenor could not grieve the Level II decision as it was final.

This case is fraught with procedural errors which have made a mess of a grievance which could have easily been resolved by simply talking to Intervenor when this grievance was filed, or by LBOE checking its own records. Both Grievant and Superintendent Kelley had their facts wrong regarding Intervenor's injury.

Not all of the multiple procedural errors need to be addressed. The undersigned finds that Intervenor timely asked to intervene at Level II, by placing his request to intervene in the mail on February 10, 1997. See McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). Even though the time periods are very short for moving grievances through the lower levels, it was reasonable for Intervenor to believe that this grievance would not progress through a Level I decision and a Level II hearing and decision in three working days.

Even if the intervention at Level II were not timely, the first Level II decision specifically allowed Intervenor to intervene after the decision was rendered, and to appeal that decision either to Level III or Level IV. (See footnote 6) Grievant did not appeal that decision, and is stuck with it in its entirety. Intervenor did what was allowed by the Level II decision. Respondent's second Level II decision denying Intervenor relief because he did not proceed to Level III, after telling him he could proceed either to Level III or Level IV, is simply unfair, and in error. A party cannot be told by Respondent he may proceed in a certain manner, and then when he does so be dismissed from the proceeding on a technicality. Intervenor acted as quickly as possible, and proceeded as directed. He was not at fault to any degree.

Intervenor proved he had previously grieved the same issue raised by Grievant, and LBOE had agreed he was correct and adjusted his seniority accordingly. This resulted in Intervenor once again being ahead of Grievant on the seniority list, and when the Harts Creek run was posted, he was awarded that position. Grievant did not indicate that she disagreed with the resolution of that grievance, once she was made aware of the facts.

One cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995). This

principle has been extended to the settlement of a grievance. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). The burden of proof is upon Grievant to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of law or public policy. Id. Grievant has not shown the settlement agreement between the parties to Intervenor's grievance was entered into unfairly or in contravention of some law or public policy. Id. In fact, once they were made aware that Intervenor was off work on Workers' Compensation in 1996 as a result of an injury as an LBOE employee, all parties seemed to agree that Intervenor should have been ahead of Grievant on the seniority list when the position in question was awarded. (See footnote 7) Thus, the settlement reached in Intervenor's previous decision stands.

The bus run in question is no longer available, and Intervenor cannot be instated into the position. As a result of Respondent's action, however, Intervenor incurred substantial personal expense to travel to a more distant bus run. He seeks reimbursement for mileage, and for the extra time he spent in performing his duties. Intervenor travelled 6,262 miles in his personal vehicle from March 7 through June 4, 1997, which he would not otherwise have incurred, as a direct result of Respondent's imprudent action and clear mistake, and should be reimbursed for his expense. See Surber v. Mingo County Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990).

Intervenor cited Payton v. Lincoln County Bd. of Educ., Docket No. 89-22-649 (Feb. 16, 1990), as authority for the proposition that he should also be compensated for the two hours he spent each day performing his duties, which he would not have worked had he been performing the Harts Creek run. Intervenor was paid at the proper rate of pay for performing the Duval run. Other thanthe mileage placed on his personal vehicle, he has incurred no other costs which were proven. Payton appears (See footnote 8) to have allowed the type of award proposed by Intervenor, which is essentially in the nature of punitive damages. Such an award in grievance proceedings is the exception, not the rule. In this case, LBOE's actions in failing to check its own records and then washing its hands of the matter, were negligent, if not intentional. However, Intervenor's mileage reimbursement will amount to about $2,000.00. The undersigned declines to award more.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "Settlement agreements prior to final administrative decision in a grievance matter are not subject to challenge by employees who were not parties to the prior grievance, unless those employees can prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of some law or public policy." Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

2. Grievant failed to prove by a preponderance of the evidence that the settlement of Randy Toney's grievance was not fairly made or was in contravention of law or public policy.

Accordingly, the grievance is **DENIED**. Intervenor's appeal is **GRANTED**. The Lincoln County Board of Education is **ORDERED** to correct its records as necessary to reflect that Intervenor was more senior than Grievant as of February 3, 1997, as a result of a coin toss, and to compensate Intervenor for the mileage he incurred as a result of the Lincoln County Board ofEducation's mistake, at the standard mileage rate allowed by the Internal Revenue Service from March 7, 1997, through June 4, 1997.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: October 20, 1997

Footnote: 1

Grievant questioned whether an Intervenor could appeal an adverse decision rendered at a lower level. The undersigned ruled prior to the hearing that Intervenor could appeal the adverse Level II decision. Although the grievance procedure does not address this issue, the reasoning of the Supreme Court of Appeals of West Virginia in Hale v. Mingo County Bd. of Educ., 484 S.E.2d 640 (W. Va. 1997), regarding the right of an intervenor to assert an affirmative claim, requires a finding that an intervenor also be allowed to appeal decisions adverse to him. This conclusion is also supported by W. Va. Code § 18-29-3(u) which provides that an intervenor becomes a party to a grievance "at any level when that employee

claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties," and by this Grievance Board's rulings that an employee cannot file a grievance to challenge a final decision rendered on another employee's grievance. See Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995). Thus, the employee's recourse is to intervene and appeal any adverse decision.

Footnote: 2

The record was left open until July 31, 1997, to allow Respondent to submit Board of Education Exhibits 2 and 3. These exhibits were not submitted and are not a part of the record. This grievance became mature for decision on August 21, 1997, upon receipt of Intervenor's written argument. Respondent declined to submit written argument.

Footnote: 3

It appears that Grievant was on notice at this time that Respondent was crediting Intervenor with seniority for the time he was off work on Workers' Compensation, and she should have raised this issue at that time. However, the parties did not assert that her grievance was not timely filed, and that issue may not be raised by the undersigned.

Footnote: 4

Apparently, Intervenor was not interested in the run selected by Grievant, as he was not placed in the position she had selected in resolution of his grievance. Otherwise, Grievant would have certainly been aware that Intervenor had filed a grievance, and this issue had been resolved in Intervenor's favor. She should have been aware when she filed this grievance that something had occurred to change the seniority list, since she had been allowed to select a run ahead of Intervenor in the fall.

Footnote: 5

Intervenor testified regarding the days he worked, and submitted the record he kept of days he had worked as an exhibit. The record differed from his testimony in that it reflected that Intervenor did not work March 31 through April 4, 1997, while Intervenor did not note this in his testimony; and it reflected that he worked on a Saturday, April 26, 1997, which Intervenor did not note in his testimony. The undersigned will take notice that most, if not all, school systems in the state have a week of vacation near Easter as Spring Break. It is likely that March 31 through April 4, 1997, was Spring Break, and Intervenor did not work that week. Intervenor's post-hearing written argument claimed compensation for 50 full days, which would be correct if that week were omitted. The undersigned will not allow Intervenor to claim April 26, 1997, as there is no testimony to explain why he would have made the Duval run on a Saturday.

Footnote: 6

On February 11, 1997, LBOE's counsel sent a memorandum to Nancy Pauley, who is responsible for maintaining LBOE's personnel records. That memorandum stated:

> *Concerning Bonnie Manns and Randy Toney's seniority, Dallas and I have decided to have this issue resolved by the Grievance Board or the Courts regarding how time off for workers['] comp affects seniority and specifically whether or not such time which is credited to another employer besides our Board should be counted towards our seniority. Assuming Randy either intervenes and appeals* ***or files***

> ***his owngrievance**, the issue will be joined and we can get a definitive answer. Meanwhile, Randy is going to be off anyway for medical reasons and Bonnie will be driving his run. (Emphasis in original.)*

Footnote: 7

Intervenor should have continued to be credited with seniority while he was off work receiving Workers' Compensation benefits, as the result of an injury suffered as an LBOE employee. See W. Va. Code § 18A-4-8g; Baker v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-514 (July 8, 1997); Crouch v. Putnam County Bd. of Educ., Docket No. 40-89-010 (Apr. 13, 1989). Whether Intervenor can be credited with seniority for the period of time he was off work on Workers' Compensation from February 12 through March 6, 1997, as the result of an injury suffered while an employee of Adams Trucking, cannot be addressed in this proceeding, as it is not properly an issue before the undersigned.

Footnote: 8

The ordering language in Payton outlines the compensation to be paid, "less any appropriate offset."