KAREN S. SUMMERS,

Grievant,

v. **Docket No. 98-30-224**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Karen S. Summers, employed by the Monongalia County Board of Education (MCBE) as a bus operator, filed a level four grievance appeal on June 28, 1998, in which she alleged that she: fractured her right ankle on November 8, 1996 and did not return to work for the remainder of the 1996-97 school year. Grievant was released to work on August 5, 1997 by her physicians. The Respondent declined to permit the Grievant to return to work until the completion of a functional capacity examination and evaluation by a rehabilitation specialist. Grievant did not return to work until October 15, 1997. Grievant alleges a violation of [W. Va.] Code §18A-4-8b, §18A- 4-16, §18A-4-10 and equitable principles of law. Grievant requests lost wages & benefits from extra-duty and extracurricular assignments that she missed as a result of her enforced absence from employment pursuant to a directive from the Respondent.

A level four hearing was conducted on September 10, 1998, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBE was represented by Jacob D. Mullett, Assistant Superintendent. (See footnote 1)

The facts of this matter are undisputed and may be set forth as the following formalfindings of fact.

Findings of Fact

1. Grievant is employed by the Monongalia County Board of Education as a bus operator.

2. During the 1996-97 school year Grievant suffered an injury to her ankle. She later had surgery and was in rehabilitation during the summer of 1997. As a result of the injury she was awarded a ten percent disability by Workers' Compensation. (See footnote 2)

3. On August 5, 1997, a physician (with an illegible signature) released Grievant to return to

her normal duties.

4. On August 12, Grievant completed her annual bus operator physical. Dr. Rasmussen noted that she had undergone surgery on her ankle and could press fifty pounds with that foot. He certified that Grievant met the physical qualification for a school bus operator.

5. Sometime later, MCBE Assistant Transportation Director Dwaine Prickett contacted Dr. Rasmussen and advised him that two hundred pounds of pressure isrequired to stop the bus. Based upon this information, the doctor determined that Grievant did not meet the physical qualifications pending further evaluation by a physical therapist. 6. By letter dated August 21, 1997, to Thomas Druge, Grievant's physical therapist, Mr. Mullett inquired as to how many foot pounds of pressure she could exert on her foot, whether she could sustain sufficient pressure on the brake pedal at a lengthy stop to keep the bus under control, and how many foot pounds could she exert during a panic or emergency stop. Mr. Mullett indicated that Grievant would not be allowed to return to work until Dr. Rasmussen was satisfied that she met the physical qualifications.

7. Mr. Druge responded that Grievant could exert one-half her body weight on her foot, but deferred responding to the remaining two questions, stating “this should be evaluated by a lower extremity FCE (Functional Capacity Exam)”. He referred the parties to another physical therapist for that review.

8. Physical therapist Phil Cooke notified MCBE by letter of September 10, 1997, that Grievant was capable of “performing medium level work in a safe and productive manner” but recommended that she undergo an evaluation by a Certified Driver Rehabilitation Specialist to verify her ability to successfully perform all driving tasks which may be placed on her as a school bus operator.

9. Driver Rehabilitation Specialist R. Michael Ramsey reported to MCBE on October 8, 1997, that based on his observations, Grievant could return to driving a school bus with no restrictions.

10. Upon receipt of Mr. Ramsey's report, Dr. Rasmussen certified that Grievant met the physical qualifications for a school bus operator on October 14, 1997. 11. MCBE requested that the State Department of Education facilitate the processing of Grievant's certification by telefax, and she was allowed to return to work on October 15, 1997.

12. MCBE compensated Grievant for her regular salary from the date school started in August, through her return to work in October.

13. While she was not certified to work, Grievant lost the opportunity to accept a number of

extra-duty assignments, and the opportunity to accept a mid-day extracurricular assignment which continued throughout the school year.

Discussion

Grievant argues that MCBE questioned the findings of two doctors who had released her to return to work when it required that she submit to further evaluation. Although MCBE provided Grievant her regular salary, the delay deprived her of the additional compensation she would have earned for the extra-duty and extracurricular assignments. Because MCBE's concerns were unfounded, Grievant asserts that simple equity dictates she be made whole, and requests compensation for the extra-duty and extracurricular assignments. (See footnote 3)

MCBE asserts that it is required by the West Virginia School Transportation Regulations to question and report any physical concerns or problems that may jeopardize the safety and welfare of students while being transported. Had Grievant's situation not been reported to Dr. Rasmussen, it would have constituted negligence. MCBE notes thatnormal physical examinations by physicians are not designed to test the capability of an individual who has incurred such a severe injury, and whose work requires specific abilities. Therefore, the State Transportation Department required the additional testing before it would issue certification to Grievant. MCBE notes that it did not require Grievant to take leave without pay during the extended evaluation, and asserts that remittance of her regular pay fulfilled any and all financial obligation to her.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Clearly, MCBE has a duty to insure the safety of its students and employees. Grievant does not allege any impropriety in requiring that she undergo additional evaluation to ascertain whether she had regained the ability to successfully perform the duties of a bus operator. Neither does Grievant assert that certification was improperly denied to her prior to October 1997. Since an individual cannot drive a school bus without certification, Grievant was unable to perform her duties, and had no vested right to any income.

Equity does not support the granting of the requested relief in this matter, because Grievant had

no expectation of compensation until such time she received certification and resumed her duties. Simply because MCBE awarded Grievant her regular salary createsno entitlement to any additional income she may have received from extra-duty and extracurricular assignments.

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

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Grievant has failed to prove that she is entitled to compensation for extra- duty and extracurricular assignments which she was unable to accept during a period of time when she was not certified to function as a school bus operator.

Accordingly, the grievance is **DENIED.**

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

Date: November 20, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The grievance was apparently denied at level one, although the response was not made part of the record. A level two hearing was conducted on February 12, 1998; however, a decision had not been issued by June 8, 1998. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and proceeded to level four. Absent a response from MCBE to a Show Cause Order, the level four hearing was scheduled.

Footnote: 2

This would apparently be a permanent partial disability award.

Footnote: 3

At level four, Grievant did not address the statutory violations cited in her appeal, and relied solely on the equity argument in her proposed findings of fact and conclusions of law. Accordingly, the alleged statutory violations are deemed abandoned.