JOANNA COSTELLO,

Grievant,

v. **DOCKET NO. 99-30-525**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This matter involves four separate grievances initiated by Joanna Costello ("Grievant") on August 13, 1998, which were consolidated for hearing at level two on November 18, 1999. (See footnote 1) They were denied in written level two decisions dated December 8, 1999. Level three consideration was bypassed, and Grievant appealed to level four on December 20, 1999. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on March 13, 2000. Grievant was represented by John Roush, counsel for the School Service Personnel Association, and Respondent was represented by counsel, Harry M. Rubenstein. This matter became mature for consideration upon receipt of the completed level two transcript on May 8, 2000. (See footnote 2)

The four grievances allege as follows:

1. Grievant was denied requested grievance forms by her supervisor on August 13, 1998. She seeks a directive to her supervisor to provide grievance forms when requested.

2. Grievant contends a less senior teacher's aide was awarded a longer summer contract term than she was. She seeks an additional sixteen days of pay for the summer term.

3. Grievant's schedule was altered and an assignment added thereto on one day without her written consent or compensation. She seeks compensation at her regular hourly rate for the added time, with interest.

4. Grievant was denied the opportunity to take extra duty assignments connected with her summer job during the summer of 1998. She seeks compensation for the assignments she should have received, with interest.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent Monongalia County Board of Education ("MCBOE") as an aide in the transportation department.

2. During the summer of 1998, Grievant was employed as a transportation aide in MCBOE's extended school special education program.

3. Grievant was employed in the summer program for 28 days, from June 22, 1998, to August 6, 1998.

4. Jackie Mattern, also a transportation aide, worked in the summer program from June 22, 1998, to August 6, 1998.

5. Grievant was erroneously informed by Ms. Mattern that she (Ms. Mattern) had received a longer summer employment term than any other transportation aide.

6. On July 23, 1998, after having completed her morning bus run, Grievant and the bus operator to whom she was assigned were directed by Dwaine Prickett, School Bus Supervisor, to pick up a child who had missed his morning bus. It took Grievant and the driver less than one half hour to pick up the child and take him to school. The child wasnot normally assigned to Grievant's bus.

7. During the summer extended school term in 1998, children were taken on seven field trips to local sites. The buses that received these assignments were not picked according to any specific order, and the drivers and aides did not receive any supplemental pay for the trips. All seven trips were less than three hours long.

8. After failing to obtain grievance forms from Mr. Prickett on August 13, 1998, Grievant obtained the forms from an employee representative, and initiated the instant grievances on the same day.

9. Grievant's daily work schedule during the summer of 1998 included a morning run from approximately 7:00 a.m. until approximately 8:30 to 9:00 a.m., and an afternoon run from approximately 11:30 a.m. until approximately 2:00 p.m.

10. Grievant was paid for a seven hour work day during the summer of 1998.

Discussion

As these grievances do not involve disciplinary matters, Grievant bears the burden of proving each element of her claims 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. The four subject grievances will be addressed individually.

Failure to Provide Grievance Forms

Grievant contends that she discussed the other three grievances presented here with her supervisor, Mr. Prickett, on August 13, 1998. She testified that Mr. Prickett toldher the grievances had no merit, and he refused to give her the proper forms for filing them. After this alleged refusal, she obtained the forms from another source, and the grievances were filed on the same day. Conversely, Mr. Prickett testified that he had no memory of discussing any of these grievances with her, and that he did not refuse to give her the forms. Mr. Prickett and Richard Gemas, Transportation Supervisor, both testified that they keep grievance forms in their offices, which are provided to any employee who requests them.

It is difficult for the undersigned to determine what exactly occurred with regard to the grievance forms, because the testimony on that subject was presented only in the form of the level two transcript, making credibility determinations extremely difficult. However, it is clear from the record that Grievant's supervisors are well aware of their responsibility to provide grievance forms when requested, (See footnote 3) which was the relief she had sought regarding this particular grievance. In addition, whatever misunderstanding may have occurred between Grievant and Mr. Prickett, she was not prevented from filing her grievance by his alleged refusal to provide forms. Under these circumstances, the issue has become moot and any ruling on the merits of this issue would constitute an inappropriate advisory opinion. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996); Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 606 (1986);Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989).

Jackie Mattern's employment term Grievant testified at level two that Ms. Mattern allegedly "bragged" that, during the summer of 1998, she was allowed to compile the bus schedule, and that

she provided herself with a longer employment term than the other transportation aides. As admitted by Grievant's counsel, the evidence of record does not support Ms. Mattern's alleged statements. She and Grievant worked exactly the same number of days during the summer term, so Grievant is not entitled to any relief with regard to this matter.

"Schedule Change"

Grievant contends that MCBOE violated the provisions of W. Va. Code § 18A-4- 8a(7) when it required her to pick up another student after she had completed her morning bus run. That statute states as follows:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a, must be decided on a case-by-case, fact-specific basis. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996). See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992). This Grievance Board has previously observed that a literal interpretation of Code § 18A-4-8a would essentially prohibit any changes in a school personnel employee's work schedule. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989). Such a literal interpretation would produce an absurd result, inconsistent with the apparent legislative intent ofprotecting school service employees from involuntary changes in their shift assignments. Sipple, supra. See State ex rel. Frazier v. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994).

The evidence presented does not support a finding that Grievant was subjected to an unlawful schedule change. The situation at issue was a one-time, emergency circumstance, and it was not a "change" in Grievant's daily work schedule. Grievances regarding this issue have involved permanent alternations by a board of education to an employee's schedule, usually adding assignments for each and every work day. One-time emergencies are certainly not contemplated by the provisions of the statute prohibiting schedule changes. Moreover, as has been previously recognized by this Grievance Board, it is permissible for a board of education to add work time to an employee's daily

schedule, when that employee is already being compensated for more hours than he or she actually works, as is often the case with transportation employees. See Dillon v. Cabell County Bd. of Educ., Docket No. 97-06-570 (May 29, 1998). Grievant was being compensated for a seven hour work day, and the record does not reflect whether or not she remained on the premises between her morning and afternoon runs. Whether she did or did not remain at the bus garage, the one-time added trip after her morning run is not something for which she is entitled to receive additional compensation.

Extra Duty Trips

MCBOE does not dispute that seven extra duty trips occurred during the summer of 1998, all involving field trips to various locations within the county. The bus operators and aides who received these assignments received no supplemental pay for them. According to Mr. Gemas, such runs had previously entitled the employees to extra pay, but that he had discontinued this practice. Although the aides who received the runs were notpaid extra for them, Grievant alleges she should be paid what she would have received if she had been awarded her share of these assignments.

Respondent contends that it had no obligation to compensate employees for these field trips, pursuant to Grievance Board decisions stating that it is not unlawful for a board of education to "[require] bus operators to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation." Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995), aff'd, Circuit Court of Kanawha County, No. 95-AA-54 (Nov. 6, 1995). However, all of the cases upholding this principle, including Broughman, involved boards of education which had enacted and followed an established board policy of requiring bus operators (and, if needed, aides) to remain on standby between runs, or a situation in which the employee voluntarily accepted the additional assignment, knowing it would not provide for additional compensation. See Cole v. Putnam County Bd. of Educ., Docket No. 99-40-019 (Feb. 26, 1999); Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-424 (Feb. 8, 1999); Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (April 22, 1997).

There is no evidence in this case that MCBOE had such a policy. Although Mr. Gemas testified that he had discontinued the practice of paying drivers and aides for field trips "about three years ago," Grievant stated that she had been paid for such assignments during her employment in the summer of 1997. Therefore, in 1998 when similar assignments were made, the Board clearly did not have any policy in place whereby employees were expected to make such trips without

compensation, as in the cases cited above. A unilateral decision made by Mr. Gemas does not constitute MCBOE policy. Mr. Gemas admitted that MCBOE had taken no action in this regard, had not enacted anyparticular policy, and it was his own decision to not pay employees for summer field trips. Furthermore, Mr. Gemas could not recall providing any particular notification to the transportation department employees that the previous practice or policy had been altered.

It appears from the evidence presented that MCBOE has not provided sufficient justification for being excused from compensating its employees for extra duty bus trips during the summer of 1998. W. Va. Code § 18A-4-8a requires a board of education to compensate employees for extra duty assignments, which are defined by W. Va. Code § 18A-4-8b as "irregular jobs that occur periodically or occasionally such as . . . field trips." However, Grievant has not provided any specific evidence regarding which of these trips she would have been awarded, if the policy regarding the assignment of these runs had been followed. No evidence has been introduced regarding MCBOE's current policy regarding such assignments. Nevertheless, the undersigned takes administrative notice that in another recent Grievance Board case, evidence was introduced showing that MCBOE had enacted, in 1995, an alternative policy for making extra duty assignments, as is permitted by W. Va. Code § 18A-4-8b. See McElroy v. Monongalia County Bd. of Educ., Docket No. 99-30-213 (Feb. 14, 2000). (See footnote 4) That policy provides that extra duty trips of less than three hours are assigned by the transportation supervisor "according to [each] driver's work schedule." Accordingly, it is completely unknown whether Grievant would have received any of these assignments at all, let alone which ones, if the policy were followed. Accordingly, the undersigned finds there is insufficient evidence to award Grievantrelief for MCBOE's failure to properly award extra duty assignments. As was the case in McElroy, supra, any relief would be purely speculative, which is not awarded by this Grievance Board. Pierson v. Ritchie County Bd. of Educ., Docket No. 98-43-006 (May 29, 1998); Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992).

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, Grievant bears the burden of proving each element of her claims 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. The Grievance Board will not issue an advisory opinion. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996); Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 606 (1986); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989).

3. No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee. W. Va. Code § 18A-4-8a(7) .

___4. The requirement that an employee make an extra bus run to transport a child who had missed his normally assigned bus, on a one-time, emergency basis, does notconstitute a schedule change as contemplated by the provisions of W. Va. Code § 18A-4- 8a(7).

5. Where a county board of education has a long-standing practice and policy requiring its transportation employees to remain on standby status between their morning and afternoon bus runs to perform additional uncompensated driving during the regular work day, such work becomes part of the employee's work day, and not work for which additional compensation must be paid. Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (April 22, 1997); See Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995), aff'd, Circuit Court of Kanawha County, No. 95-AA-54 (Nov. 6, 1995).

6. MCBOE had a past practice of compensating transportation employees for extra bus runs made during the special education summer program, prior to the summer of 1998.

7. A board of education is required to compensate employees for extra duty assignments, which are defined by W. Va. Code § 18A-4-8b as “irregular jobs that occur periodically or occasionally such as . . . field trips.”

8. Extra duty assignments are to be made on a rotating basis according to length of service; however, a board of education may adopt an alternative procedure for making such assignments. W. Va. Code § 18A-4-8b.

9. Awarding Grievant compensation for extra duty assignments which were awarded during the

1998 summer term would be speculative, which is not available relief from this Grievance Board. Pierson v. Ritchie County Bd. of Educ., Docket No. 98-43-006 (May 29, 1998); Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13,1992); See McElroy v. Monongalia County Bd. of Educ., Docket No. 99-30-213 (Feb. 14, 2000).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 19, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

There is no explanation in the record for the lengthy delay between level one and level two proceedings.

Footnote: 2

Respondent had provided a level two transcript to the Grievance Board prior to the level four hearing in this matter. However, after that hearing was held, it was discovered that a portion of the level two transcript was missing, because it had not been transcribed.

Footnote: 3

W. Va. Code § 18-29-3(l) states that grievance forms and other documents must be made available by the immediate supervisor to any employee, upon request.

Footnote: 4

Respondent's counsel made reference to this alternative policy for making such assignments in his post-hearing

argument, although no actual evidence on the issue was submitted. Accordingly, it is presumed that the same policy is still in effect.