ROBERT McCLUNG,

Grievant,

v. **DOCKET NO. 02-34-223**

NICHOLAS COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Robert McClung filed this grievance on June 21, 2002, stating "Grievant, a regularly employed school bus operator, contends that the Respondent is assigning extra-duty assignments to substitute school bus operators instead of to regularly employed school bus operators. The Grievant alleges a violation of West Virginia Code § 18A-4-8b." As relief, he seeks "the opportunity to take extra-duty assignments."

The grievance was denied at Levels I and II, and a Level IV hearing was held on August 19, 2002. Grievant was represented by WVSSPA attorney John E. Roush, Esq. and Respondent was represented by its attorney Erwin Conrad, Esq. The parties agreed to submit their proposed Findings of Fact and Conclusions of Law by September 6, 2002, whereupon the matter became mature for decision.

At Level II, hearing evaluator Jerry A. Wright denied the grievance without considering its merits, on the grounds that Grievant had no standing, as he alleged no harm and was requesting an advisory opinion. No evidence was presented at the Level II hearing, but the testimony of Grievant and Respondent's Transportation Director, DaveBaber was taken at Level IV. The Level IV hearing was limited by the undersigned Administrative Law Judge to the issue of whether Grievant has standing to pursue his claim through the Grievance procedure because Respondent was not prepared to present evidence relating to the merits of the grievance.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is a regularly-employed bus operator working for Respondent. In addition to his

regular morning and afternoon runs, he has a regular extra-curricular assignment after school and in the summer. He is number two on the seniority roster for the Richwood area.

2. Respondent has adopted a policy of assigning midday extra-duty trips "on a seniority rotating basis. If a driver is unable to make a trip due to his/her regular run commitment he/she will be refused and the trip will be assigned to the next driver in line." Respondent's Exhibit No. 1. Substitute drivers are permitted to sign up for extra trips, and are placed last on the seniority roster, after the regular drivers.

3. When an extra-duty assignment is available, it is assigned to the first available driver who is next on the seniority rotation. If a driver's regular schedule conflicts with the assignment, he is not considered available. The substitute drivers are placed at the end of the seniority list, so if all regular drivers are unavailable, it is assigned to a substitute.

4. Notations are made on the extra-duty roster denoting when assignments are made and who is next. Grievant's Exhibit No. 1. (See footnote 1) The roster shows next to each driver's name the date of the assignment, and a code of "P" is the driver was passed over becauseof a conflict, an "R" is the driver voluntarily refused the assignment, and a "T" if the driver took the assignment.

5. For the 2001-2002 school year, there was never an occasion where an assignment designated "P" for Grievant was given to a substitute driver.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Grievant has neither proven that Respondent does take the actions he accuses them of, nor has he proven any harm to him as a result of the actions it does take. Grievant's objection is to Respondent's practice of failing to excuse him from his regular assignment in order to take an extra-duty assignment. However, his statement of grievance speaks for itself: "Grievant, a regularly employed school bus operator, contends that the Respondent is assigning extra-duty assignments to substitute school bus operators instead of to regularly employed school bus operators." According to Grievant's own evidence, on no occasion has an extra-duty assignment been assigned to a substitute bus operator instead of to Grievant, whether Grievant was passed over because of a conflict with his regular assignment, or when Grievant refused the extra-duty assignment.

"A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994)." Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002). Even if Grievant proved the allegations contained in his statement of grievance, he can show no harm done, especially when he makes the distinction between whether the assignment is ultimately given to a regular driver or to a substitute.

Grievant claims that he is harmed even though he did not ask for any monetary damages or back wages, and suggests that if a claim for money is all that is needed to convert this from an advisory grievance to a sustainable grievance, he only need wait until the first time he is passed over during the 2002-2003 school year to refile. While I agree that a request for past monetary damages is not necessarily the measure of harm, Grievant cannot possibly show that there has in the past been or will in the future be an economic harm to him when a substitute is used to drive an extra-duty assignment, but he is not so harmed when a regular driver is used. "A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994)." Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41- 531 (April 3, 2002). Although adding the substitutes to the rotation increases slightly the number of persons to be rotated through before Grievant gets another assignment opportunity, that is not Grievant's complaint - he simply feels that it is wrong for a substitute to drive an assignment that he is not available, but it isn't wrong for another regular operator to do so.

Even though the Level IV hearing was limited to the issue of standing, and it has been found lacking, Grievant presented sufficient evidence at the hearing to determine that, even if he did have standing, he could not prevail on the merits. While the policy of adding the substitutes to the rotation list was not shown to be proper, the practice ofbypassing regular bus operators who are busy was not improper. Since Grievant failed to show any entitlement to an extra-duty assignment that conflicts with his regular duty, who that assignment ultimately goes to is immaterial.

Grievant cites W. Va. Code § 18A-4-8b, which states:

> (f) Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in

> the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

Respondent, on the other hand argued both that its alternative procedure had been approved by the employees in the manner specified in the Code section, and that State Board of Education Policy 4336 prohibits making an extra-duty assignment when it interferes with the driver's regular schedule. That policy section states: “Schedules for approved trips shall not interfere with the regular transportation schedule.” 126 C.S.R. 92 § XII.A.2.

Grievant's Code cite requires Respondent to follow a seniority-based rotation schedule, which it does, altered only by adding substitutes at the end of the rotation and it practice of skipping a driver if an assignment interferes with his or her regular schedule. Respondent's claims its alternative policy is permissible because it was approved by “both by the county board and by an affirmative vote of two thirds of the employees within thatclassification category of employment.” W. Va. Code § 18A-4-8b(f). Respondent argues that Grievant has not proven the vote did not take place. While Grievant bears the burden of proving Respondent has failed to comply with the Code, Respondent's assertion that it has an excuse for deviating from the Code is an affirmative defense, for which it must assume the burden of proof. Instead of requiring Grievant to prove Respondent did not take the vote required, as Respondent suggests, it is up to Respondent to prove it did approve the policy and put it to a vote. Mr. Baber testified there has been no particular vote on giving trips to substitutes. Respondent presented no evidence of a Board resolution adopting the policy, and no evidence a vote was ever taken. Accordingly, it has failed to meet its burden of proving its affirmative defense.

Nevertheless, “[it] has been previously held by this Grievance Board that it is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. *See* Smith v. Putnam County Bd. of Educ., Docket No. 99-40-058 (Apr. 2, 1999).” Russell v. Wayne County Board of Education, Docket No. 02-50-041 (Mar. 25, 2002). The same logic would apply to extra- duty runs. If Grievant were permitted to take an extra-duty run

that interfered with his regular run, a substitute would be needed for his regular run, he would be required to use his leave for the part of his regular run he did not perform, and in general the needs of both his employer and the students would be less efficiently and safely met. West Virginia Code § 18A-4-8b(f) only requires the most senior employee be given *priority* in making the assignment, and that requirement is met by Respondent's policy of fist checking to see if the most senior employee is available. That Code section does not require unconditionally that the most senior be given the assignment. Grievant has therefore failed to prove an entitlement to the extra-duty assignments he seeks to be offered, and therefore failed to show harm by the failure to offer them to him.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. “A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50- 272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).” Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002).

3. Asserting that an alternate to the W. Va. Code § 18A-4-8b procedure for making extra duty assignments was approved “both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment” is an affirmative defense to the claim that the normal procedure was not used, and Respondent asserting that defense bears the burden of proving it. 4. West Virginia Code § 18A-4-8b(f) only requires the most senior employee be given *priority* in making the assignment, and that requirement is met by Respondent's policy of fist checking to see if the most senior employee is available. That Code section does not require unconditionally that the most senior be given the assignment.

5. Grievant failed to show that he had been or would be harmed by the actions of Respondent,

and so lacks standing to pursue this grievance.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 16, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Admitted over the objection of Respondent.