ELAINE PRICKETT, et al.,

Grievants,

v. **Docket No. 02-30-242D**

MONONGALIA COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, (See footnote 1) employed as bus operators by Respondent Monongalia County Board of Education ("MCBOE"), initiated this proceeding in late July, 2002, alleging that bus operator positions posted for the summer of 2002 should have been assigned as extra- duty bus runs. They each seek payment for the bus runs made in conjunction with the athletic tournament at issue. Grievants alleged a default at level one, and, on August 8, 2002, MCBOE requested a level four hearing regarding the default issue. Subsequently, Respondent conceded a default had occurred, and a level four hearing was held in the Grievance Board's office in Westover, West Virginia, on November 18, 2002, for the purpose of determining whether Grievants' requested remedy is contrary to law or clearly wrong. Grievants were represented by counsel, John E. Roush, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 18, 2002. The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants are regularly employed as bus operators.

2. A summer basketball tournament was to be held in Morgantown, West Virginia, on July 14-16, 2002. Students would need transportation from their hotels to the tournament and to other sites around town. MCBOE was requested to provide bus transportation to these students.

3. MCBOE posted these positions for bid to be awarded to six bus operators, dividing them into shifts. Two drivers would take the 6-hour morning shifts on Sunday and Monday; two additional drivers would take the 6-hour afternoon shifts on Sunday and Monday; and two more drivers would take the evening shift on Monday evening. Two buses operated during each six-hour shift.

4. These positions were awarded, based upon seniority, to applicants who bid on them.

5. Each driver who was hired for the tournament drove his/her bus in a “loop,” covering a designated area, repeatedly during his/her shift.

6. MCBOE posted the positions as summer jobs, because the tournament will occur every summer, and the successful applicants earned summer seniority while serving in the positions.

Discussion

Because Grievants are presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievants is clearly wrong or contrary to law. This standard requires the party with the burden of proof to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Respondent contends that it properly posted these runs as summer positions. However, even if Grievants are correct in their contention that these positions should have been filled as extra-duty assignments, Respondent argues that they are not entitled to receive payment for the runs, because they would not necessarily have been awarded to these particular Grievants.

Grievants are correct that these bus runs should have been treated as extra-duty assignments and should not have been posted. West Virginia Code § 18A-4-8b defines extra-duty assignments as “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.” Clearly, this three-day summer basketball tournament would constitute an “occasional” assignment, making it extra-duty. The statute further provides that such assignments shall be made on the basis of seniority on a rotating basis, unless the employees within that particular job classification have voted upon an alternative procedure. Such a procedure has been adopted in Monongalia County, providing for one day's notice to drivers for trips of less than three hours, according to the drivers' schedules, and a seniority-based rotation for so-

called “long” trips which are in excess of three hours. Using the “break-down” method for these assignments which was chosen by MCBOE, they would constitute “long trips” under the county's policy. Accordingly, the rotation roster for such trips should have been used to determine to which six drivers the runs would be assigned. That roster reflects that the last trip assigned was on June 29, and the next trip was not until July 17, after the bus tournament at issue. The names of 12 drivers, including Grievants Dave Gerard and Wendell Tate, appear between the names of the drivers who were awarded the June 29 and July 17 trips. However, only Grievant Gerard's name is included within the first six names; Grievant Tate's name is the eighth name which appears after the name of the last driver who drove on June 29. It is unknown which drivers would have accepted the assignments, but it is possible they could have gone to the first six people whose names appear after the June 29 driver. Grievant Gerard has expressed an interest in the basketball tournament runs, and, because of the position of his name in the rotation, he should have received a portion of these assignments. As to all Grievants except Mr. Gerard, Respondent has proven by clear and convincing evidence that payment to all of them as if they had been awarded the runs in question would be clearly wrong, because it is obvious that not all of them, if any, could have been awarded the bus tournament runs. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998). As to Grievant Gerard, Respondent is directed to compensate him for working two six-hour shifts of the basketball tourmanent. The following conclusions of law support the decision reached.

Conclusions of Law

1. Once Grievants are presumed to have prevailed by default, the burden of proof is upon Respondent to prove by clear and convincing evidence that the relief requested by Grievants is clearly wrong or contrary to law. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. Extra-duty assignments are “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips,” and they are to be made in a seniority-based rotation or pursuant to a method lawfully adopted by the employees in

the particular classification of employment. W. Va. Code § 18A-4-8b.

3. The bus trips made during a basketball tournament in July of 2002 were extra-duty assignments and should not have been posted.

4. Respondent has failed to prove by clear and convincing evidence that Grievant Dave Gerard would not have received one of the bus runs in question if assigned per the extra duty “long trip” roster.

5. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

6. Most, if not all, of the other Grievants would not have been assigned these runs under the extra duty rotation, so it would be contrary to law and clearly wrong to award the relief requested.

Accordingly, this grievance is **GRANTED** as to Grievant Gerard, and Respondent is directed to compensate him in accordance with this Decision. The grievance is **DENIED** as to all other Grievants.

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: January 13, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The named Grievants are Elaine Prickett, Illa Powroznik-Hess, Wendell Tate, Larry Rowan, John Snyder, Elizabeth Snyder, Sheila Hixenbaugh, William Sollars, Ronald Friend, Darryl White, Larry Cool, Kenneth Statler, David Gerard, and Randy Yost.