JOHN BURFORD, ET AL.,

Grievants,

v. **DOCKET NO. 02-20-327**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) filed this joint grievance stating: "Grievants seek to be Mechanics only in classification." As relief, they seek: "To no longer be a sub bus operator." After being denied at the lower levels, a Level IV hearing was held in the Grievance Board's Charleston office on November 20, 2002, to supplement the record developed below. Respondent was represented by its attorney, James Withrow, Esq., and Grievants were represented by Anita Mitter of the West Virginia Education Association. (See footnote 2) The parties agreed to submit their proposed findings of fact and conclusions of law by January 13, 2003, whereupon this matter became mature for decision. Although there was substantial testimony and documentary evidence adduced, I find the following to be the germane facts relevant to the resolution of this matter that have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievants, with the exception of Eddie Tolley, are employed by Respondent at various school bus garages in the county, and are multiclassified as either mechanic/bus operator or crew leader mechanic/bus operator. Grievants Orville Fields, Jr. and Boyd McCune were originally hired as mechanics, but later signed separate agreements to obtain a bus operator's license and serve as a school bus operator. The remaining grievants were originally hired pursuant to multiclassified postings.

2. Grievant Tolley was employed before the practice of multiclassifying mechanics came into

effect, and did not agree to the change in his classification.

3. Since the 1980's, mechanics' positions have been advertised as multiclassed mechanic/bus operator. Each multiclassified employee gains seniority in both classifications, and is paid at the higher of the pay rates.

4. To be qualified for such a position, an employee must possess license and certification in both areas. Each must undergo annual training and physical exams, and maintain his licensure in both areas. All are required to drive a school bus a minimum of ten days per year.

5. Mechanics are used by Respondent to fill in for regular bus operators on occasions when the operator or a substitute is not available for various reasons, often on as little as a few minutes' notice.

6. When a mechanic is called out to drive, he must leave the job he is working on, get cleaned up, perform a pre-trip inspection of the bus, and get on the road as soonas possible. When he returns, he must determine what stage of the repair he was at when he was interrupted, and sometimes must work paid overtime to complete the job.

DISCUSSION

This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' 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. Grievants allege that the requirement that they fill in as bus operators when needed interferes with their duties as mechanics, and compromises the safety of the students being transported in the buses. Respondent counters that Grievants nevertheless agreed when they were hired or agreed later to serve as bus operators, and that both functions were essential to the positions.

Grievant Tolley is not multiclassified and is not used as a substitute bus operator. As such, he has no standing to pursue this grievance because he is unaffected by the practice, and so this grievance as it pertains to him is hereby dismissed.

Grievants cited several practical reasons why they thought mechanics should not be used as substitute bus operators, but cited no rule, law or policy which they claimed Respondent was violating by doing so. Instead, the employees appear to be attempting to make management decisions that are properly the province of school administrators. The Grievants cite occasions when mechanics

have had trouble driving buses because they were unfamiliar with the routes or unskilled at driving. They pointed out problems that occur when a mechanic is called out to drive while he is in the middle of a repair on a bus, such as forgetting where he left off, or occasions when a bus operator takes the bus out of the garage before the job is finished. (See footnote 3) Some of the issues are related to the relative lackof bus-driving skill of the mechanics, who do not regularly drive the buses, and some are related to poor judgment on the part of some bus operators who should know better than to drive a bus that is under repair. These are important safety considerations, but Grievants did not prove they were caused by the use of mechanics as substitute bus operators. Respondent has determined that meeting its shortage of qualified substitute bus operators by utilizing mechanics is a practical solution to the problem. In Wilds v. West Virginia Department of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991), it was found a grievant had standing to pursue a grievance against a practice that he alleged was "a substantial detriment to or interference with. . . [his] health and safety." However, in Wilds, the grievant alleged a policy violation, unlike the Grievants in this case, who only allege disagreement with the practice. The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Wilds v. W. Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA- 484 (Apr. 17, 1998).

The gist of Grievants' complaint is that they simply do not want to drive buses; instead, they want to be mechanics only. However, Grievants cannot deny that they are bus operators as well as mechanics, and they have demonstrated no harm in being required to perform their jobs. “Without some allegation of personal injury, a grievant is without standing to pursue the grievance. [Citations omitted.] A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself,constitute an injury sufficient to grant standing to grieve. [Citations omitted.]” Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

A separate issue for some of the grievants is whether they actually are multiclassified. In the late '90s, Respondent's computer program that was used to generate probationary and continuing contracts of employment and other employment- related documents was unable to accommodate

multiple classifications. As a result, some of the grievants hold a continuing contract that on its face shows only the mechanic classification, despite the fact that they were hired under job postings for multiclassified mechanic/bus operator openings. This issue was recently dealt with in a separate grievance filed by one of the grievants herein, Mark Byrd. In this particular situation, such employees do indeed hold a continuing contract for the multiclassified position by operation of law, after they have been employed in the position for three consecutive years and reemployed in the same position for a fourth year. Byrd v. Kanawha County Bd. of Educ., Docket No. 02-20-376 (Jan. 28, 2003).

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear 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. “Without some allegation of personal injury, a grievant is without standing to pursue the grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb.28, 1990). Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 27, 2000); Elliott v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Econ. Dev. Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See* Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000), *citing* Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).” Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (Nov. 20, 2002).

3. There is no harm in an employee being required to perform the job for which he was hired.

4. The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Wilds v. W. Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996); Smith v.

W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998).

5. Grievants did not prove by a preponderance of the evidence that the safety concerns they raise are caused by the practice of using mechanics as substitute bus operators, and alleged no policy violation.

6. Grievants have no standing to pursue this grievance because they have neither alleged nor shown injury sufficient to grant standing to grieve. 7. Service personnel hold a continuing contract for their position by operation of law, after they have been employed in the position for three consecutive years and reemployed in the same position for a fourth year. Byrd v. Kanawha County Bd. of Educ., Docket No. 02-20-376 (Jan. 28, 2003).

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

Any party may appeal this Decision to the Circuit Court of Kanawha 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: February 6, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

John Burford, Mike Abshire, William Bird, Mark Byrd, Jerry Brenwald, Junior Fields, Dwight Garnes, Ken Johnson, Dallis Maynard, Boyd McCune, Clayton Means, Dana Miles, Charles Parsons, James Pauley, Robert Reynolds, Fred Thompson, Jr., Eddie Tolley, Darrell Westfall and Homer Wileman.

Footnote: 2

Grievant's representative consented to accept service of the decision on behalf of Grievants.

Footnote: 3

Respondent has instituted a "red tag" system to prevent this, where a "do not drive" sign is placed in the bus while it is being worked on.