SANDRA VIDRINE,

Grievant,

v v.

Docket No. 03-18-173

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Sandra Vidrine, filed this grievance on November 13, 2002, against her employer the Jackson County Board of Education ("JCBOE" or "Board"). Her Statement of Grievance filed at Level II asserted: (See footnote 1)

> Grievant is a regularly employed as a paraprofessional/braille or sign language interpreter. Respondent changed Grievant's daily schedule without her consent in violation of West Virginia Code § 18A-4-8a.
>
> Relief Sought: Grievant seeks compensation for the time period for which her daily schedule was changed without her consent, November 7, 2002 to December 9, 2002.

This grievance was denied at Level I, and the relief sought granted before Level II. Grievant then filed to Level II where the grievance was denied. Thereafter Level III was bypassed. Grievant appealed to Level IV on June 24, 2003, and a Level IV hearing was scheduled for October 21, 2003. The parties decided to submit this case on the record, and the scheduled hearing was canceled. This case became mature for decision on October 6, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts she should receive fifteen dollars a day additional compensation for the days her

schedule was changed without her consent. JCBOE maintains the relief Grievant sought was granted before Level II, when Superintendent Ronald Ray reinstated Grievant's prior schedule. Further, Respondent notes the changes in Grievant's schedule were required by the needs of the Special Education students she serves, Grievant was on notice that her schedule was subject to change, and the changes to Grievant's schedule were minimal. Finally, Respondent notes that even though there were slight changes in Grievant's schedule, Grievant never worked more than eight hours a day.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Paraprofessional/Braille or Sign Language Interpreter. This is a Special Education aide position, and Grievant assists students both on the bus and in the classroom.

2. Grievant's schedule requires her to start her day on the bus, and then go to the classroom to assist Special Education students. Grievant's workday ends eight hours after her workday starts; another Aide rides the bus home with the students.

3. For the 2002 - 2003 school year, Grievant was informed about her "tentative schedule" through a letter dated August 8, 2002. This letter stated "[t]here may be slight changes" and that her time "may need to be adjusted slightly based upon the final transportation schedule." Grt. No. 5 at Level II.

4. For the first few weeks, Grievant's work day would start at 6:35 a.m. and end at 2:35 p.m. After that time period, her normal schedule would be 6:20 a.m. to 2:20 p.m.

5. Grievant was also informed in the August 8, 2002 letter to turn in a Master schedule with Grievant's start and end times so the Special Education Director could be assured the students were arriving at school prior to the start of classes, and the Director would be aware of Grievant's daily schedule.

6. Grievant did not turn in a complete Master schedule. The Special Education Director did not find out until October of 2002, that the students on Grievant's bus were arriving late to school. Two more students had been added to the transportation schedule.

7. JCBOE had previously been cited by the West Virginia Department of Education for failing to assure the Special Education students were in the classroom for the full school day.

8. As soon as the Special Education Director found out about the late arrival to school, the bus schedule, and, of course, Grievant's schedule, were changed to correct this problem.

9. On November 7, 2002, Grievant directed to meet the bus at 6:05 a.m. and to quit work at 2:05 p.m.

10. Grievant never worked more than an eight-hour day the entire school year.

11. After this change on November 7, 2002, the bus operator received an additional fifteen dollars a day because his schedule was lengthened both in the morning and in the afternoon. 12. Grievant filed this grievance on November 13, 2002. Superintendent Ray met with Grievant before Level II in an attempt to settle the grievance and granted the relief sought at that time. JCBOE believed the grievance was settled on December 10, 2002, when one student was removed from the bus, and the prior times of 6:20 a.m. to 2:20 p.m. were reinstated.

13. The bus operator's schedule was also changed, and he no longer received the additional compensation after December 10, 2002.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 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 employer has not met its burden. Id.

Grievant claims the Board violated W. Va. Code § 18A-4-8a(7) when it made changes to her original work schedule without her consent. W. Va. Code § 18A-4-8a(7) provides:

> 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. This issue has already been determined by the Grievance Board in Napier v. Mingo County Board of Education, Docket No. 00-29-086 (July 13, 2000) (See footnote 3) , and Sipple v. Mingo County Board of Education, Docket No. 95-29-487 (Mar. 27, 1996). Napier and Sipple involved changes to the schedule of special education aides required to assist special education students on school-provided transportation. The Administrative Law Judge in Napier cited Sipple and held:

> Notwithstanding the language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have the freedom to make reasonable changes to a service employee's daily work schedule within the parameters of her contract, some of which cannot reasonably be effected until shortly after school starts.

Id. (citations omitted). The Grievance Board concluded the school board's modifications to the aide's transportation duties and schedule were not arbitrary or capricious or schedule "changes" contemplated by the West Virginia Legislature under W. Va. Code § 18A-4-8a(7), as they were made in response to the changing needs of the student population and within the parameters of an aide's contract. These grievances were denied. Napier, supra; Sipple, supra.

Napier was appealed to the Kanawha County Circuit Court, Civil Action No. 00-AA- 133,(2001), was reversed, and Grievant relied on this holding to support her argument in this grievance. Napier was then appealed to the West Virginia Supreme Court of Appeals, and a decision was issued reversing the Circuit Court. Napier v. County Bd. of Educ. of Mingo, No. 31117 (Oct. 10, 2003).

After a lengthy discussion about statutory construction, the West Virginia Supreme Court reversed the circuit court and held:

> Insofar as Ms. Napier's position requires her to be assigned to a specific bus to assist the special needs students riding said bus, it may be said that her daily schedule corresponds to, or is commensurate with, the daily route of the bus to which she is assigned. As such, the duration of Ms. Napier's workday is defined by the daily schedule of Bus Number 9607. Thus, the Board acted within its authority when it required Ms. Napier to meet the bus at Musick, in order to attend to a student's needs, instead of at Busch High School, as it earlier had instructed her do so. Moreover, to the extent that Ms. Napier's job is solely to care for the special needs students to whom she is assigned, it is entirely plausible that her daily schedule would not be static throughout the school year[,] but might be adjusted, within the confines of Bus Number 9607's daily route, in order to permit her to accommodate fewer or greater numbers of students as their needs dictate. Therefore, because the Board did not change Ms. Napier's work schedule in violation of W. Va. Code § 18a-4-8a(7), we find that the circuit court committed reversible error by rendering its contrary ruling.

Id.

Given this direction by the West Virginia Supreme Court of Appeals, the undersigned Administrative Law Judge finds Grievant's schedule is "defined by the daily schedule of [her bus]" and there has been no violation of W. Va. Code § 18A-4-8a(7).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 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 employer has not met its burden. Id.

2. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va., 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97- 34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

3. Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a(7), which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. Napier v. Mingo County Board of Education, Docket No. 00-29-086 (July 13, 2000); 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).

4. Courts may venture beyond the plain meaning of a statute in those instances where a literal application would produce an absurd result. State ex rel. Frazierv. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994). A strict, literal interpretation of W. Va. Code § 18A-4-8a would preclude a school board from ever changing a service employee's schedule, even slightly, as one school year technically ends on June 30 and a new school year begins each July 1. Napier, supra; Sipple, supra; Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989). Such a literal result would produce an absurd result, inconsistent with the apparent legislative intent of protecting school

service employees from involuntary changes in their shift assignments. Sipple, supra.

5. Like bus operators, aides who assist special education students commuting to and from school on school-provided transportation, are assigned duties of an itinerant nature. Napier, supra; Sipple, supra.

6. Notwithstanding the language in W. Va. Code § 18A-4-8a(7), restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract, some of which cannot reasonably be effected until shortly after school starts. Napier, supra; Sipple, supra. See Conner, supra; Froats; supra. Accord, Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1100 (Aug. 2, 1995).

7. Grievant failed to prove by a preponderance of the evidence that the Board abused its discretion, acted in an arbitrary and capricious manner, or violated W. Va. Code § 18A-4-8a(7) when it made reasonable modifications to Grievant's bus schedule as an Aide assigned to assist special education students commuting on school-provided transportation mandated by the changing needs of the student population. 8. Because Grievant's position required her to be assigned to a specific bus to assist the special needs students riding this bus, "her daily schedule corresponds to, or is commensurate with the daily route of the bus to which she is assigned. As such, the duration of [Grievant's] workday is defined by the daily schedule of [her bus]." Napier v. County Bd. of Educ. of Mingo, No. 31117 (Oct. 10, 2003). The Board acted within its authority when it made minor changes in Grievant's schedule to accommodate the needs to these Special Education students.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Jackson 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 aparty 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 2003

Footnote: 1

The original Statement of Grievance only stated W. Va. Code § 18A-4-8a was violated, and the original relief sought was reinstatement of schedule and/or compensation (money).

Footnote: 2

Grievant was represented John Roush, Esq., from the West Virginia School Service Personnel Association, and the Board was represented by Howard Seufer, Esq. of BowlesRice McDavid Graff & Love.

Footnote: 3

In Napier, the grievant's schedule was changed, and at one point she was required to work more than eight hours.