WILLIAM REDMAN,

Grievant,

v. **Docket No. 04-18-028**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant William Redman is employed as a Special Education bus operator by the Jackson County Board of Education ("JCBOE"). His Statement of Grievance alleges:

> **Grievant is regularly employed as a school bus operator. Grievant contends that his daily work schedule has been changed without his written consent. Grievant alleges that the Respondent has violated West Virginia Code § 18A-4-8a(8).**
>
> **Relief sought: Grievant seeks compensation at his regular hourly rate for the additions/changes to his daily schedule.**

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on January 20, 2004, and a Level IV hearing was scheduled for March 15, 2004. At the hearing, the parties agreed they had no additional evidence to present. This case became mature for decision on April 14, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts his schedule was changed without his written consent after the start of the school year, and he avers he should receive additional compensation for these changes. Respondent notes Grievant signed a document agreeing to the changes,JCBOE has the authority to make such changes for the benefit of the students, and Grievant is paid to work eight hours, even though his work time is less than that.

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

Findings of Fact

1. Grievant has been employed as a regular bus operator for seven years. All of this time he has been a Special Education bus operator. Grievant had generally performed the same run for at least several years.

2. All bus operators are paid for an eight-hour day whether they work the entire eight hours or not.

3. On March 17, 2003, Grievant was sent a memorandum by his supervisor, Jim Stewart, informing Grievant that Mr. Stewart had met with Lisa Martin, the Director of Special Education, and had determined a tentative bus route for Grievant for the next school year. The purpose of this memo was to share this route with Grievant, give him an opportunity to agree or disagree with the route changes, and if he did not agree, notify him he would be placed of the transfer list for subsequent reassignment.

4. Grievant's route for the 2003 - 2004 school year would be as follows: "South on Route 21 and I-77 to the Kanawha County line, north to Kentuck, Sugar Creek, Goldtown and Kenna surrounding areas, north to Fairplain area and into Ripley." Resp. No. 2.

5. On April 10, 2003, Grievant agreed to the changes on his route. Resp. No. 2. Grievant checked the statement that said, "I agree to the bus route (#56) schedule change as outlined above, effective for the 2003-2004-school year. By agreeing to thisassignment, I waive my right for a hearing before the Board of Education concerning this matter."

6. Grievant's route for the 2003 - 2004 school year has always been in the area as described by the statement in Finding of Fact 4.

7. Grievant's initial assignment sheet indicated he would have ten children and seven stops. (See footnote 2)

8. The first week of school Grievant had eight children and five stops. This route included the three M children. This first week his route did not include two students, one in preschool and one in kindergarten, as these grade levels do not attend school the first week. Grievant was aware these students would be added the second week, and these students

were on the assignment sheet given to Grievant before school started.

9. Contrary to Grievant's testimony, the students did not arrive to school a few minutes after 8:00 a.m. the first week of school, but arrived approximately 25 minutes late for the start of school. This lateness necessitated a change in Grievant's schedule.

10. Because of Grievant's complaints, JCBOE, during the second week of school, tried placing some of Grievant's students on regular buses. These students were identified as the three M children. This endeavor did not work, and the students were replaced on Grievant's bus for the third week. These students' IEP's (See footnote 3) **required them to ride a Special Education bus. 11. The third week of school, after the M children were replaced on Grievant's bus, he was back to his original assignment of ten children and seven stops. Because the students had been late arriving to school, Grievant was required to start his run earlier than originally planned.**

12. On September 18, 2003, Grievant's schedule was changed again and the time needed to complete the run was decreased as one student was removed from his bus. Grievant now had nine students and six stops, as opposed to the ten students and seven stops originally assigned.

13. Both the Supervisor of Transportation and the Assistant Superintendent in charge of transportation have examined the bus schedules in detail because of Grievant's numerous complaints, but there is no other Special Education bus to take these students where they need to be.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both

sides, the employee has not met his burden. Id.

I. Written agreement **Grievant claims the Board violated W. Va. Code § 18A-4-8a(7) when it made changes to his original work schedule without his consent. 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 Bd. of Educ., Docket No. 00-29-086 (July 13, 2000)** **(See footnote 4)** **; 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).**

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.**

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. Frazier v. 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. See Vidrine v. Jackson County Bd. of Educ., Docket No. 03-18-273 (Oct. 31, 2003); 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.

Grievant agreed in writing on April 10, 2003, to the changes in his assignment, but he asserts this agreement was only for the first day of school and/or for the first schedule he received, the one dated July 18, 2003. However, as revealed by the evidence, this schedule when put into practice got the students to school 25 minutes late, and this was without the full complement of students. Clearly this schedule was unworkable and had to be changed. It is unreasonable to think there would be no need to refine a schedule that had not been tested.

Grievant also complained about the change from the second to the third week. This complaint is baseless as this change only returned Grievant to his original schedule after JCBOE had attempted to lessen Grievant's schedule by removing some of his students the second week, but had to replace them because the change was untenable.

While it is true Grievant had to start his run earlier and complete it later than JCBOE had hoped, there was never any agreement between the parties that Grievant would only work a set number of hours, and the change was based on the needs of the students. It must be remembered that a no time was Grievant ever required to work more than eight hours, and in fact he worked less than that.

II. Was the change in Grievant's schedule a violation of W. Va. Code § 18A-4- 8a(7)? This issue has already been determined by the Grievance Board and affirmed by the West Virginia Supreme Court of Appeals in Napier v. Mingo County Board of Education, Docket No. 00-29-086 (July 13, 2000), reversed Kanawha County Circuit Court, Civil Action No. 00-AA-133, (2001), reversed Napier v. County Board of Education of Mingo, 591 S.E.2d 106 (W. Va. 2003). (See footnote 5) **See Vidrine v. Jackson County Bd. of Educ., Docket No. 03-18-273 (Oct. 31, 2003); 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.

In Napier, after a lengthy discussion about statutory construction, the West Virginia Supreme Court reversed the circuit court, affirmed the Grievance Board, 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 [his 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 his 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 (May17, 1993). Where the evidence equally supports both sides, the employee has not met his 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), rev'd Kanawha County Circuit Court in Civil Action No. 00-AA-133, (2001), rev'd Napier v. County Bd. of Educ. of Mingo, 591 S.E.2d 106 (W. Va. 2003); 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. Because Grievant agreed in writing to the changes in his schedule there is no violation of W. Va. Code § 18A-4-8a(7).

5. 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. Frazier v.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.

6. Bus operators, who provide transportation for Special Education students, are assigned duties of an itinerant nature. Napier, supra; Sipple, supra.

7. 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 his 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).

8. 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 Special Education bus schedule in order to ensure school-provided transportation met the needs of the student population.

9. Because Grievant's position required him to drive a specific bus, "[his] daily schedule corresponds to, or is commensurate with the daily route of the bus to which [he]is assigned. As such, the duration of [Grievant's] workday is defined by the daily schedule of [his bus]." Napier v. County Bd. of Educ. of Mingo, 591 S.E.2d 106 (W. Va. 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 to the Circuit Court of Jackson 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 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: May 27, 2004

Footnote: 1

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

Footnote: 2

Although unclear from the record, it appears there were three M children at one stop.

Footnote: 3

Individual Educational Plan

Footnote: 4

This case was reversed by the Kanawha County Circuit Court in Civil Action No. 00-AA-133, (2001), but the circuit court was then reversed and the Grievance Board affirmed in Napier v. County Board of Education of Mingo, 591 S.E.2d 106 (W. Va. 2003).

Footnote: 5

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