LEONARD MOONEY,

Grievant,

v. **Docket No. 04-20-394**

KANAWHA COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Leonard Mooney ("Mooney") is employed by the respondent, the Kanawha County Board of Education ("BOE"), as a bus mechanic at the Elkview terminal. He filed two grievances that were consolidated for hearing at Level II. The Level II hearing was held on October 14, 2004.

After having been denied at Levels I and II, then bypassed at Level III, the consolidated grievance was brought to Level IV on November 9, 2004. In his statement of grievance, Mooney asserts that BOE "erred" in a) "changing his shift from 6 am - 2 pm to 8 am - 4 pm; and b) utilizing a less senior mechanic for an extraduty assignment on May 21 and 22, 2004." He alleges violations of West Virginia Code sections 18A-2-7 and 18A- 4-8b. For relief, Mooney asks for "reassignment to the 6 am - 2 pm shift" and "compensation for wages lost as a result of failure to assign the May 21-22, 2004 extraduty assignment to Grievant [Mooney]."

A Level IV hearing was held on January 5, 2005. Mooney was represented by attorney John Everett Roush, of the West Virginia School Service Personnel Association. BOE was represented by its counsel, James Withrow. This grievance matured for decisionon February 7, 2005, upon receipt of proposed findings of fact and conclusions of law that were submitted by each party.

Burden of Proof

Neither of the issues raised in this grievance is a disciplinary matter. Therefore, Mooney bears the burden of proving, by a preponderance of the evidence, that he is entitled to prevail. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing

than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

As discussed more thoroughly below, Mooney failed to meet this burden. Therefore, this grievance will be denied.

The Change in Mooney's Shift

During Mooney's long tenure as a bus mechanic for BOE, he has worked the 6:00 a.m. to 2:00 p.m. shift at the Elkview garage. Mooney was notified in the spring of 2004 that he was being considered for transfer to a different shift for the 2004-2005 school year. Mooney opposed the change in his schedule and, pursuant to his rights under West Virginia Code section 18A-2-7, requested a hearing before BOE. The hearing took place on April 27, 2004, after which BOE approved Mooney's transfer to the 8:00 a.m. to 4:00 p.m. work shift, effective July 2004. Mooney still reports to the Elkview garage, where he remains the only mechanic who is not certified to operate a school bus with passengers on board. He is, however, able to drive a school bus without passengers.

Mooney claims that the change in his work schedule is arbitrary and capricious. He reminds BOE that he is the most senior mechanic at the Elkview garage and, possibly, within the county. As such, Mooney does not believe that he should be required to change his hours. Further, he notes that the new hours make it more inconvenient for him to work a second job that begins at 4:30 p.m.

BOE responds that the change was made for the legitimate purpose of providing coverage at the Elkview garage in the afternoon. It is well-settled that a board of education is afforded substantial discretion in connection with “the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. pt. 2, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*). In this case, it serves the best interests of the schools to have mechanics who can also substitute as bus operators report to work at times that make them available for morning or afternoon bus runs.

Although mechanics such as Mooney cannot transport students, it is helpful to have them available at the bus garage to deal with any emergencies. For instance, if a bus loaded with students

were to have a mechanical problem, Mooney could drive an empty bus to the location of the breakdown so that students would not be left sitting on anincapacitated bus. The operator of the stranded bus could transfer students to the operational bus and continue the route, while Mooney waited for the tow truck.

This is particularly helpful in terms of the afternoon bus runs. Because fewer students ride the bus in the morning, transportation personnel have greater flexibility in adapting morning runs to address any problems that arise. More students ride the buses in the afternoons, making it more difficult to address problems that may arise with the various routes. It thus makes good logistical sense to have Mooney, as well as other mechanics who lack the passenger endorsement, report to work during the middle shift so that they can provide afternoon coverage at the garage.

The decision to move Mooney to the 8 a.m. to 4 p.m. shift was undoubtedly unsettling to him after his many years of working the earlier shift. It was, however, part of a well-reasoned plan to provide the students of Kanawha County with reliable school bus service. In fact, Mooney conceded that there have been occasions since he began working the later shift when he was the only mechanic who remained on site at the Elkview garage. Changing Mooney's work schedule to provide additional coverage in the afternoon cannot be considered an arbitrary and capricious decision.

Mooney continues to disagree with the decision to change his shift. Nonetheless, an employee's "'belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (November 30, 1999)(additional citations omitted). Mooney did not allege that BOE's decision to changehis work schedule in any way impinged upon his job performance, health or safety. It is clear that his desire to remain on the earlier shift arises from nothing more than personal preference. Mooney's disagreement with a management decision notwithstanding, he has failed to prove entitlement to any relief with respect to the change in his work schedule.

In his grievance statement, Mooney alleged a violation of West Virginia Code section 18A-2-7. This statute requires the superintendent to notify an employee, in writing, "on or before the first Monday in April if he is being considered for transfer or to be transferred." If the employee wants

> to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or

> employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.

W. Va. Code § 18A-2-7(a).

Mooney did not address this statute in his proposed findings of fact and conclusions of law. Nor did he offer any theory as to how its provisions may have been violated. Therefore, it appears that Mooney has abandoned any claim relating to West Virginia Code section 18A-2-7. Even if not abandoned, Mooney has failed to prove that his transfer did not comport with the requirements of West Virginia Code section 18A-2-7.

The Emergency Assignment

In addition to the change in his work schedule, Mooney also grieved the fact that he was not called out for an assignment at 9:00 p.m. on Friday, May 21, 2004. A bus from Wood County had broken down after transporting students to an athletic event at LaidleyField. Someone from Wood County contacted George Beckett, Kanawha County's Administrative Assistant for Pupil Transportation, for help. At the time, Mr. Beckett was in his car. When he was unable to contact the transportation supervisor, he called Bruce Basham, whose number happened to be programmed into Mr. Beckett's cell phone.

Mr. Basham, who is a mechanic at the Crede warehouse, then undertook the task of locating a mechanic who could provide assistance to the Wood County bus. He first tried, without success, to reach the crew leader at the Elkview garage. He then contacted Junior Fields, one of the mechanics from the Elkview garage. Mr. Fields agreed to work on the Wood County bus. The work continued from Friday, May 21, into Saturday, May 22.

Because Mooney is the most senior mechanic at Elkview, he claims that he should have been called upon to repair the Wood County bus. As a consequence, he is asking for the overtime pay that he would have received if he had been called out on May 21, 2004. (See footnote 1) Mooney's argument on this point is based upon West Virginia Code section 18A-4-8b(f), which provides, in pertinent part, that

> 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.

Mooney has characterized the repairs to the Wood County bus as an extra-duty assignment that should have been awarded under the seniority-based rotation system described above.

BOE disputes whether the Wood County bus repair could properly be described as an extra-duty assignment. Within West Virginia Code section 18A-4-8b(f), 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." BOE correctly notes that, in each of the foregoing examples of extra-duty assignments, there is a common element of foreseeability that allows for advance planning. By contrast, having an out-of-county bus break down at Laidley Field was not a situation that could have been anticipated or planned for.

BOE characterizes that event as an emergency. The Supreme Court of Appeals of West Virginia has held that "[i]n general, the essential elements of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action." Syl. pt. 3, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524, 525 (1989). The breakdown of the Wood County bus meets this definition of an emergency. As such, BOE claims that the assignment falls outside of the requirements of West Virginia Code section 18A-4-8b(f).

In support of this argument, BOE cites *Tate v. Monongalia County Board of Education*, Docket No. 02-30-318D (Jan. 8, 2003). *Tate* involved an extra-duty bus run to take students to the airport in Pittsburgh for an out-of-state trip. The students brought too much luggage for the one bus to handle so there was an immediate need to have a second bus make the trip with the extra luggage so that the students would not miss their flight.The transportation supervisor had trouble finding someone to take the trip on short notice. Ultimately, a mechanic took the assignment and drove the luggage to Pittsburgh.

The *Tate* grievants asserted that driving the luggage to the airport was an extra-duty assignment that should have been offered to the next driver on the rotation list. The board of education argued that it was an emergency rather than an extra-duty assignment. The *Tate* decision is of questionable assistance to BOE because it was actually decided on the basis of the speculative nature of the grievants' claims for monetary relief.

In addition, Monongalia County has adopted an alternative procedure for assigning extra-duty bus

runs, as permitted under West Virginia Code section 18A-4-8b. Although normal extra-duty runs are assigned by seniority on a rotating basis, there is an express provision that "'[e]mergency situations involving last minute bookings or a driver's cancellation shall be handled by the supervisor.'" *Sizemore/Lemley v. Monongalia County Bd. of Educ.,* Docket No. 98-30-428 (Jan. 26, 1998). *Sizemore/Lemley* was resolved, in part, based upon the discretion afforded the transportation supervisor with respect to emergency situations. There is no evidence that a similar policy has been adopted by Kanawha County or that it would apply to calling out a mechanic after regular work hours to repair an out-of-county bus. In the absence of such policy in Kanawha County, *Tate* does not really support BOE's argument in this grievance.

Nonetheless, BOE is correct that the Wood County bus situation, which meets the definition of an emergency, is not an extra-duty assignment within the meaning of West Virginia Code section 18A-4-8b(f). Therefore, the task of repairing that bus did not need to be assigned pursuant to the seniority-based rotation described in West Virginia Code section 18A-4-8b(f). Because the assignment did not need to be made using the seniority-based rotation list, Mooney cannot establish that he should have been given the overtime work on the out-of-county bus. This aspect of his grievance must be denied.

Upon review of the entire record, including the transcripts of the transfer hearing and the consolidated Level II hearing, the undersigned finds that the following pertinent, operative facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Mooney, who has been employed by BOE for over thirty-three years, is the most senior mechanic assigned to the Elkview school bus garage.

2 2. Mechanics employed by BOE are required to obtain the appropriate certification to be able to operate a school bus carrying passengers. Because Mooney was employed by BOE before this requirement went into effect, it does not apply to him.

3 3. Mooney can drive a bus but only when there are no passengers aboard.

4 4. In March 2004, Mooney was informed in writing of BOE's intention to transfer him from the 6 a.m. - 2 p.m. shift at the Elkview garage to a shift beginning at 8 a.m. and concluding at 4 p.m. at the same garage.

5 5. After a hearing before BOE, the change in Mooney's work schedule was approved for the 2004-2005 school year.

6 6. Mechanics who have the passenger endorsement can fill in when substitute bus operators are not available. Those mechanics are assigned to the early and late shifts in case they need to take a bus run.

7 7. Mechanics such as Mooney, who do not substitute for bus operators, are assigned to the middle shifts. This makes them available in case a bus has problems during the afternoon. 8 8. Mooney's schedule was changed so that he would be in the garage in the afternoons as a back-up in case of an emergency while the other mechanics are out on bus runs.

9 9. Afternoon coverage at the garage is more important than morning coverage because lighter bus loads in the morning make it easier for the administration to make adjustments to deal with problems. By contrast, more students right the bus home in the afternoon, leaving transportation officials with less flexibility for addressing problems.

10 10. Mooney works at another job after his work day at the Elkview garage ends. Although he complains that the change in his schedule is inconvenient, it does not prevent him from getting to his second job on time.

11 11. The work performed by Mooney in terms of maintaining and repairing school buses has not changed despite the change in his work schedule.

12 12. On the night of Friday, May 21, 2004, a school bus transporting students from Wood County broke down at Laidley Field in Charleston.

13 13. The problem was communicated to Kanawha County's Administrative Assistant for Pupil Transportation, George Beckett. At that time, Mr. Beckett was in his car and had to rely upon his cell phone to reach people to try to help the Wood County bus.

14 14. Mr. Beckett reached Bruce Basham, who is a multiclassed mechanic based at the Crede facility, and asked him to locate a mechanic to go to Laidley Field to fix the Wood County bus.

15 15. When Mr. Basham was not able to contact the crew leader from the Elkview garage, he called Junior Fields, for whom Mr. Basham was able to locate a telephone number. 16 16. Although Mr. Basham was aware that Mooney works at the Elkview garage, he did not know how to reach Mooney.

17 17. There is no listing under Mooney's name in the telephone directory. The listing is under

his father's name and, thus, would be difficult for Mr. Basham, or anyone else, to locate.

18 18. Mooney was home on the night of May 21, 2004, and would have been available to repair the Wood County bus if he had been called.

Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

19 1. This is not a disciplinary grievance. Therefore, Mooney bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *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).

20 2. Mooney must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). “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).

21 3. “'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in amanner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. pt. 2, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

22 4. An action is recognized as “arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F. Supp. 670 (E.D. Va. 1982)).

23 5. The decision to move Mooney to a different shift was in the best interests of the school system because it was part of a plan that helped assure the reliability of school bus transportation for Kanawha County students.

24 6. Having Mooney available as a back-up during the afternoon, when other mechanics from his garage could be out on bus runs, is a reasonable, logistically sound move that cannot be considered arbitrary and capricious.

25 7. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (November 30, 1999)(additional citations omitted).

26 8. Although clearly displeased with the change in his schedule, Mooney has not claimed that the change has caused "a substantial detriment to, or interference with" his ability to perform his job effectively, or with his health and safety. 27 9. Mooney has not proven that the decision to change his schedule violated any rule, regulation or statute. Standing alone, Mooney's dissatisfaction with the decision to change his work hours does not provide a predicate for relief.

28 10. Mooney alleged a violation of West Virginia Code section 18A-2-7 but failed to make any reference to this claim in his proposed findings of fact and conclusions of law. Therefore, he is deemed to have abandoned this claim.

29 11. Even if he did not abandon this claim, Mooney failed to prove that the transfer process did not comport with the requirements of West Virginia Code section 18A-2-7.

30 12. West Virginia Code section 18A-4-8b(f) requires that extra-duty assignments be offered to employees rotation based on seniority.

31 13. Extra-duty assignments are defined, for purposes of West Virginia Code section 18A-4-8b(f), as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

32 14. The breakdown of the Wood County bus at Laidley Field satisfied the definition of an emergency in that it was a condition that was "unforeseen or unanticipated" and "it call[ed] for immediate action." Syl. pt. 3, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524, 525 (1989).

33 15. Because it lacks the foreseeability that characterizes an extra-duty assignment, the emergency task of repairing the Wood County bus did not fall within the statutory definition of an extra-duty assignment.

34 16. It was not necessary to assign the work on the Wood County bus in accordance with the system of rotation described in West Virginia Code section 18A-4- 8b(f).

35 17. Mooney has failed to establish that he should have been called out to repair the Wood

County bus.

Accordingly, 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 West Virginia Code section 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: March 28, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The parties did not indicate whether Kanawha County or Wood County bore the overtime expense for repairing the Wood County bus.