WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CARL BOLTON, ET AL.,

Grievants,

v. **Docket No. 06-01-412**

Sue Keller

Senior Administrative Law Judge

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Carl Bolton, Tom Kittle, and Gary Marsh ("Grievants"), employed by the Barbour County Board of Education ("BCBE") as bus operators, filed a level one grievance on August 23, 2006, in which they alleged a violation of *W. Va. Code* § 18A-4-8(e) when they were not paid a full days wages for an assignment performed on a Sunday. For relief, Grievant requested the difference between the compensation they received and their salary for a full day. The grievance was denied at levels one and two. Grievants elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and filed a level four appeal on November 8, 2006. John E. Roush, Esq., of the West Virginia School Service Personnel Association, represents Grievants, while Assistant Superintendent Jeff Kittle and Transportation Coordinator Karen Boone represents BCBE. During a scheduling conference conducted on December 14, 2006, the parties agreed to submit the grievance for decision based upon the lower level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed on or before January 16, 2007.

The following facts have been derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Employed by BCBE, Grievant Bolton holds the multi-classified title of Bus Operator/Mechanic, while Grievants Kittle and Marsh are classified as Bus Operators. All three held

200-day employment terms during the period of time at issue.

2. Grievants notified BCBE that they would be interested in accepting summer bus trips which are assigned based on seniority. Grievants were called to transport Philip Barbour High School band students to summer band camp in Cowan, West Virginia, on July 23, 2006.

3. Grievant Bolton submitted a trip sheet for five hours. Grievants Kittle and Marsh submitted trip sheets for six hours, due to their departure from a different location.
Grievants were paid for the time listed on their trip sheets.

4. July 23, 2006, was a Sunday.

5. Although Grievants work Monday through Friday during the regular school year, none had worked the previous week, nor the week following.

6. Prior to 2006, ten-month employees who took summer trips were sometimes paid for a half-day or full-day, rather than for actual time worked.

Synopsis

Grievants argued that a Sunday assignment of five to six hours entitled them to a full day of pay under the provisions of *W. Va. Code* § 18A-4-8(e), and past practice of the county. BCBE asserts that it may have incorrectly paid bus operators in previous summers, but that Grievants are not entitled to any additional pay for the July 23, 2006 assignment. The statutory language supports BCBE, and an incorrect past practice creates no future entitlement for employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 18-29-6. *See also 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). "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

This case involves the language of *W. Va. Code* § 18A-4-8(e), which states:
If an employee whose regular work week is scheduled from Monday through Friday agrees to perform any work assignments on a Saturday or Sunday, the employee shall be paid for at least one-half day

of work for each day he or she reports for work, and if the employee works more than three and one-half hours on any Saturday or Sunday, he or she shall be paid for at least a full day of work for each day.

Grievants argue that they are entitled to a full day's salary because the statutory language of *Code* § 18A-4-8(e) does not limit its application to the employment term of the employee, nor is it limited to situations when the employee actually worked the previous or subsequent Monday through Friday. Grievants additionally rely on the past practice of BCBE to compensate employees for the full day, a practice which had not been properly changed, even if such a change was otherwise in compliance with the law. BCBE asserts that the change was made in compliance with federal guidelines, and that it is not bound to continue past mistakes. The language of subsection (e), which is part of a statutory provision establishing employment terms for service personnel, references weekend payment for employees who regularly work Monday through Friday. Grievants did not work prior to, or after, the assignment in question, and are not entitled to the special compensation provisions it provides.

Neither are Grievants entitled to additional compensation based on past practice. The Grievance Board has previously determined that "[i]n the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05- 43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-246 (Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd. of Educ*., Docket No. 92-30-314 (Nov. 30, 1992); *Biller v. Upshur County Bd. of Educ.*, Docket No. 90-49-533 (Sept. 27, 1991); *Napier v. Lincoln County Bd.of Educ*., Docket No. 89-23-635 (May 25, 1990); *Isaacs v. Lincoln County Bd. of Educ*., Docket No. 89-22-555 (Jan. 12, 1990); *Terek v. Ohio County Bd. of Educ*., Docket No. 35- 87-294-3 (July 20, 1988).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); *Howellv. W. Va. Dep't of Health &*

Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 18-29-6.

2. *W. Va. Code* § 18A-4-8(e), provides that if an employee whose regular work week is Monday through Friday agrees to perform any work assignments on a Saturday or Sunday, and works more than three and one-half hours, he or she shall be paid for at least a full day of work for each day.

3. Grievants were not regularly employed either the week before or after the assignment at issue and were not entitled to the additional wages addressed in *W. Va. Code* § 18A-4-8(e).

4. "In the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05-43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-246 (Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd. of Educ*., Docket No. 92-30-314 (Nov. 30, 1992); *Biller v. Upshur County Bd. of Educ.*, Docket No. 90-49-533 (Sept. 27, 1991); *Napier v. Lincoln County Bd.of Educ*., Docket No. 89-23-635 (May 25, 1990); *Isaacs v. Lincoln County Bd. of Educ*., Docket No. 89-22-555 (Jan. 12, 1990); Terek v. Ohio County Bd. of Educ., Docket No. 35- 87-294-3 (July 20, 1988).

5. Grievants have failed to prove they are entitled to any additional compensation for the assignment they completed on July 23, 2006.

Accordingly, the grievance is **DENIED.** Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour 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.

DATE: FEBRUARY 8, 2007 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE