THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HULING SPENCER,

Grievant,

v. Docket No. 07-34-025

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Huling Spencer, is employed by the Nicholas County Board of Education ("NCBOE") as a bus operator. He filed this grievance when NCBOE would not let him permanently assign part of his regular bus run to a less senior bus operator. The portion Grievant wanted to delete from his assignment was the transporting of students to and from the grade school. Grievant also asserts he has been discriminated against. The relief sought is for NCBOE to reassign his grade school run to another bus operator.

This grievance was filed on October 5, 2006, denied at Level II, and appealed to Level IV. A Level IV hearing was scheduled, but the parties agreed to submit this case on the record developed below. Grievant was represented by Eric Gordon, Esq., and NCBOE was represented by Erwin Conrad, Esq. The matter became mature for decision on March 4, 2008, with the submission of Grievant's proposals. (See footnote 1)

Synopsis

Grievant asserts NCBOE has a long-standing practice of allowing more senior bus

operators to permanently give a portion of their assigned, regular run to less senior bus operators. Grievant believes this practice should have been followed in his case, and he avers he should be allowed to "sluff off" the grade school portion of his assigned run.

Respondent maintains the practice Grievant refers to has not been in effect since 2003, and to require NCBOE to remove part of his assigned position and permanently give it to another bus operator would violate posting requirements. Respondent also notes giving another bus operator this portion of Grievant's assigned run would decrease the efficiency to the currently assigned bus runs and would increase the amount of time grade school students are on the bus.

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

Findings of Fact

1. Grievant has been employed by Respondent for approximately ten years.

2. On January 6, 2006, Respondent posted Bus Run 65. The posting stated:

> Regular route of Bus # 65. Includes Cherry River Elementary AM and PM. AM, PM, and Midday parking at Fenwick Bus Garage or a location to be determined by Director of Transportation. Any route or parking change must have administrative approval. (Emphasis added).

3. Grievant applied for this position on January 6, 2006, and he was later awarded this bus run. The assignment required Grievant to complete a grade school run on a daily basis.

4. Because of NCBOE's switch from junior high schools to middle schools, Grievant, like all other bus operators, was sent a transfer letter in March 2006 to notify him that his bus runs could be reconfigured. Grievant did not ask for a transfer hearing, and, in the end, this change did not affect his bus route.

5. After the start of the 2006 - 2007 school year, Grievant found out some bus runs had been reconfigured, and some less senior bus operators no longer had grade school runs.

6. These runs referred to in Finding of Fact 5 were reconfigured to increase efficiency, as there were some buses with only a few passengers, traveling in the same direction as other buses. Because there was no other bus operator who traveled the entirety of Grievant's route, and because he had numerous students on his grade school run, Grievant's run was not

combined with another route.

7. For many years, NCBOE had an unwritten practice that allowed a senior driver to permanently give a portion of his assigned run, the grade school run, to a less senior driver. In 2000, when David Baber became the Director of Transportation, he was uncomfortable with this practice. NCBOE asked for legal advice on this issue and was informed this past practice was violative of statutory posting requirements. The last time a bus operator was allowed to pass-off part of his assigned and posted position was in 2003.

8. Grievant requests to give the grade school portion of his assigned run to another bus operator, thus decreasing his work load.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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. (See footnote 2) "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Grievant asserts he has been discriminated against. W. Va. Code § 18-29-2(m) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The West Virginia Supreme Court of Appeals has clarified that, in order to establish either discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

***Frymier v. Higher Educ. Policy Comm*., Nos. 32163 and 33296 (W. Va. Oct. 12, 2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e. that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.,* Docket No. 90-50-281 (Jan. 28, 1990).**

This answer to this grievance is simple. No discrimination has occurred here. When NCBOE allowed prior bus operators to engage in this incorrect and improper "sloughing-off" procedure, it was in violation of statutory mandates. NCBOE is required to follow the statutory mandates of W. Va. Code § 18A-4-8b(g) which states in pertinent part:

> **County boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.**
>
> **. . .**
>
> **(2) Notice of a job vacancy shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to prospective applicants to understand the particulars of the job. . . .**

NCBOE's past, unwritten practice violated the above cited *Code* Section. It allowed a bus operator to apply for a posted position, and then allowed this same bus operator to change the duties of his position, and, in essence, "dump" some of his assigned andposted duties on a less senior bus operator, who had not applied for them. This practice violated W. Va. Code § 18A-4-8b(g), should never have occurred, and NCBOE was correct to discontinue it. Past mistakes do not create an entitlement to future incorrect actions. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995).

Additionally, this Grievance Board has previously held that a county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-

41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.*, Docket No. 98-31-342 (Dec. 15, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03- 305 (Apr. 13, 1998); *Chilton v. Kanawha County Bd. of Educ.*, Docket No. 89-20-114 (Aug. 7, 1989), *aff'd*, Kanawha County Cir. Ct., No. 89-AA-172 (Oct. 4, 1991). Clearly, the prior Director of Transportation allowed an incorrect practice, but this error does not require NCBOE to continue this mistake.

It is noted Grievant received the duties for which he applied. The posting was clear and stated there was a grade school run. Apparently, Grievant thought he could apply for this bus run, and then renege on the portion of his assigned duties that he did not want. When he was not allowed to engage in this action, he filed a grievance. Grievant has not met his burden of proof on this issue and established he was discriminated against, or that NCBOE is required to continue a past practice in violation of W. Va. Code § 18A-4-8b(g).

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. *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. W. Va. Code § 18A-4-8b(g) requires county boards to post notices of all job vacancies. These postings must include "the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to prospective applicants to understand the particulars of the job. . . ."

3. A substantial change in the assigned duties of a position, such as the removal of a posted portion of a run, would require the reposting of the position.

4. A board of education cannot allow one employee to permanently shift his assigned

duties onto another employee.

5. A mistake made in the past does not create an entitlement to another employee, nor require the same error to be repeated in the future. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95- 15-128 (June 5, 1995). 6. A county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.*, Docket No. 98-31-342 (Dec. 15, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03-305 (Apr. 13, 1998); *Chilton v. Kanawha County Bd. of Educ.*, Docket No. 89-20-114 (Aug. 7, 1989), *aff'd*, Kanawha County Cir. Ct., No. 89- AA-172 (Oct. 4, 1991).

7. Grievant did not meet his burden of proof and establish he has been discriminated against, or that NCBOE is required to continue a past practice in violation of W. Va. Code § 18A-4-8b(g).

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 2, supra)*. Neither the West Virginia Public 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

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 21, 2008

Footnote: 1

Apparently, Grievant's attorney assumed his Level II proposals would be forwarded to the Grievance Board with the rest of the file, and they were not. On March 3, 2008, the Grievance Board called Mr. Gordon and requested these proposals be sent right away. They were faxed on March 4,2008

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.