WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DWIGHT LUCAS and PEGGY TUCKER
Grievants,

v. **Docket No. 2009-0564-CONS**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievants, Dwight Lucas and Peggy Tucker, filed this grievance against Respondent Raleigh County Board of Education ("RCBE"), on June 17, 2008. Grievants contend entitlement to employment contracts as bus operators transporting school age children participating in a summer program called the Energy Express operated by the Extension Service of West Virginia University. Specifically, the Statement of Grievance provides:

> 18-5-13 (F & G) 18-5-39. Church Buses are being used for half of energy express summer program and other half of buses used are from the Board of Education.

The original Statement of Relief Sought provided:

> Post Job Bid for 5 days (by law) and award it to bus operators from previous years.

The lower level conference regarding this matter was delayed at the request of the Grievants and was eventually conducted on September 19, 2008. The grievance was denied at level one on October 20, 2008. Grievant appealed to level two on November 3, 2008, and a mediation session was held on January 21, 2009. Grievant appealed to level three. The level three appeal form, dated February 9, 2009, transforms the relief sought as follows:

> Grievants seek reassignment to these positions in future summers and compensation, benefits, and priority for these assignments for the summer of 2008, and interest on all monetary sums.

A Level Three hearing[1] was held before the undersigned Administrative Law Judge on May 15, 2009, in Beckley, West Virginia. Grievants appeared in person and through counsel, John Roush, Esq., WV School Service Personnel Association. Respondent was represented by Gregory Bailey, Esq., Bowles, Rice, McDavid, Graff & Love, LLP.

This matter became mature for decision on or about June 15, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Raleigh County Board of Education bus operators historically provided transportation to the various site(s) of a summer program referenced as the Energy Express. West Virginia University Extension Service was vested with the authority to dictate transportation services for Energy Express sites and elected to incorporate alternate sources of transportation during the summer of 2008. Grievants argue they are

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[1] Respondent highlights that the Energy Express program was not to begin until June 23, 2008. Resp. Ex. 3. Grievants made no effort to amend the relief sought to include a claim of back pay during Level I of the grievance procedure. Based upon the timing of the conference, the relief that was requested was no longer available and the grievances were moot. Grievants had the opportunity to request that the relief sought be amended to include a claim of back pay prior to the submission of the grievance for a Level I decision. The Level I decision cited the unavailability of the relief sought in denying the grievance. Grievants altered their relief sought after the Level I decision. Respondent among other contentions avers that because Grievants had failed to identify appropriate relief their grievance was rendered moot, and the resulting Level I decision correctly determined that the relief sought was no longer available. It was determined that the merits of this grievance will be addressed prior to a decision regarding whether appropriate relief was properly requested and/or is attainable pursuant to the facts of this case.

entitled to retain the bus operator positions they held the previous summer transporting children participating in the program. Grievants rely on W. VA. CODE §§ 18-5-13 (F & G) and 18-5-39.

West Virginia CODE § 18-5-39 is applicable to summer programs established by county boards of education. The leasing of specific school bus services as authorized by W. VA. CODE § 18-5-13 does not establish an exclusive agreement for all transportation needs of an organization. Grievants did not establish that Respondent had the authority to dictate transportation arrangements for Energy Express programs. Respondent has no role in ownership, control, management or other indicia partnership with respect to the Energy Express program. Thus, the enforcement of West Virginia Statutes designed to govern the activities of county boards of education is of limited application in the facts of this matter. This grievance is DENIED.

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

Findings of Fact

1. Grievants are employed by Respondent Raleigh County Board of Education, as bus operators with 200-day contracts.

2. West Virginia University (WVU) Extension Service runs a program for school age children in Raleigh County called the Energy Express.

3. The Energy Express program is held at several of the Respondent's schools during the summer.[2] Respondent makes financial contributions and various in-kind

[2] Respondent argues that the limited involvement in the operation of the program by the Respondent removes it from the realm of summer programs established by the

contributions to the program. The in-kind contributions include providing a site and some services, including custodial service and nutritional service as a part of Respondent's summer meals program. Respondent's bus operators historically provided transportation to the site(s) of the program.

4. West Virginia University Extension Service contracts with Respondent to obtain services and support, including the use of school buses for transportation, necessary to operate the program.

5. Grievants made no showing that Respondent had the authority to dictate transportation arrangements for Energy Express programs. Respondent does not control the management or operation of the Energy Express Program.

6. Grievants worked during the summer of 2007 as bus operators for the Energy Express program at the Cranberry Prosperity School. The program ran five days per week for five to six weeks.

7. Steve Bair and Randy Howell, Bus Operators in the employ of Respondent, provided transportation services to the Coal City site of the Energy Express Program in both the summers of 2007 and 2008.

8. In the summer of 2008, St. Paul Temple Ministries and Heart of Gold Ministries, rather than Grievants, provided transportation to the Cranberry-Prosperity site.

9. Neither of the Grievants made application for the Energy Express positions that were posted for the summer of 2008. Further, Grievants did not have a summer position with Respondent in the summer of 2008.

Raleigh County Board of Education. Grievants characterize Respondent as a partner, attributing decision making authority.

10. The election to obtain transportation services from a source other than the Respondent for one of the program sites (Cranberry-Prosperity) was made by the Extension Service for the summer of 2008.

11. A contractual arrangement between the Extension Service and Respondent, provided for transportation of school-aged children to agreed Energy Express sites in the summers of 2007 and 2008. County boards of education are authorized to lease buses to public non-profit organizations to transport school-aged children for camps or educational activities. W. VA. CODE § 18-5-13, paragraph (g)(3)(A).

12. Respondent does not administer the Energy Express program. There are identifiable and specific operation conditions and constraints applicable to summer programs established by West Virginia county boards of education. *See* W. VA. CODE § 18-5-39. Grievants made no showing that Respondent had the authority to dictate transportation arrangements for Energy Express programs.

13. The 2008 contractual arrangement between WVU Extension Service and Respondent, provided for transportation of school-aged children for the Energy Express Coal City site. There was no contractual arrangement between the Extension Service and Respondent for the Cranberry Prosperity site in the summer of 2008.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in

opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Historically, Respondent's bus operators provided transportation to the various site(s) of the Energy Express program. In the summer of 2008, St. Paul Temple Ministries and Heart of Gold Ministries (church buses), rather than Grievants, provided transportation to the Cranberry-Prosperity site. Grievants argue that they are entitled to retain the bus operator positions that they held the previous summer transporting the children participating in the program, citing W. VA. CODE §§ 18-5-13 (F & G) and 18-5-39.

Entitled "Establishment of Summer School Programs," West Virginia Code §18-5-39(f) provides in part:

> **(f)** Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code. **An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer.**
> **(g)** If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

(h) For the purpose of this section, summer employment for service personnel includes, but is not limited to, filling jobs and positions as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board.

(Emphasis added)

Entitled "Authority of Boards Generally," *West Virginia Code* §18-5-13 provides, in pertinent part, the following:

Subject to the provisions of this chapter and the rules of the state board, each county board may:

(a) Control and manage all of the schools and school interests for all school activities and upon all school property owned or leased by the county, including:

. . .

(f) Provide transportation according to rules established by the county board, as follows:

(1) To provide at public expense adequate means of transportation:

. . .

(B) For school children participating in county board-approved curricular and extracurricular activities;

. . .

(3) Any school bus owned by the county board may be operated only by a bus operator regularly employed by the county board;

(4) Pursuant to rules established by the state board, the county board may provide for professional employees to be certified to drive county board-owned vehicles that have a seating capacity of fewer than ten passengers. These employees may use the vehicles to transport students for school-sponsored activities, but may not use the vehicles to transport students between school and home. Not more than one of these vehicles may be used for any school-sponsored activity;

(5) Students may not be transported to a school-sponsored activity in any county-owned or leased vehicle that does not meet school bus or public transit ratings. This section does not prohibit a parent from transporting ten or fewer students in a privately-owned vehicle;

(6) Students may be transported to a school-sponsored activity in a vehicle that has a seating capacity of sixteen or more passengers which is not owned and operated by the county board only as follows:

(A) The state board shall promulgate a rule to establish requirements for:

(i) Automobile insurance coverage;

(ii) Vehicle safety specifications;

(iii) School bus or public transit ratings; and

(iv) Driver training, certification and criminal history record check; and

(B) The vehicle owner shall provide to the county board proof that the vehicle and driver satisfy the requirements of the State Board rule; and

(7) Buses shall be used for extracurricular activities as provided in this section only when the insurance coverage required by this section is in effect;

(g) Lease school buses pursuant to rules established by the county board.

(1) Leased buses may be operated only by bus operators regularly employed by the county board.

(2) The lessee shall bear all costs and expenses incurred by, or incidental to the use of, the bus.

(3) The county board may lease buses to:

(A) Public and private nonprofit organizations and private corporations to transport school-age children for camps or educational activities;

(B) Any college, university or officially recognized campus organization for transporting students, faculty and staff to and from the college or university. Only college and university students, faculty and staff may be transported pursuant to this paragraph. The lease shall include provisions for:

(i) Compensation for bus operators;

(ii) Consideration for insurance coverage, repairs and other costs of service; and

(iii) Any rules concerning student behavior;

(C) Public and private nonprofit organizations, including education employee organizations, for transportation associated with fairs, festivals and other educational and cultural events. The county board may charge fees in addition to those charges otherwise required by this subsection;

(Emphasis added)

The Energy Express program is not under the sole control of the Respondent, yet neither is it unconnected to Respondent. Grievants contend that the factual circumstances in the current grievance are closer to the situation (Energy Express + Respondent's level of participation = Board sponsored program) than it is to the position (Energy Express ≠ Board sponsored program). Hence, Grievants assert that they are entitled to the compensation that they seek and the right to these assignments in the future.

Respondent maintains that while the facts do not support a conclusion that the Respondent lacks any connection with the Energy Express program, the limited involvement in the operation of the program by the Respondent removes it from the realm of summer programs established by the Raleigh County Board of Education.

The uncontested testimony presented at the level three hearing provided that the election to obtain transportation services from a source other than Respondent for one of the program sites was made unilaterally by the West Virginia University Extension Service. Respondent maintains it had no authority to dictate a different course of action, accordingly it is not responsible for causally connected employment decisions. Further Respondent highlights that county boards of education are authorized to lease buses to public non-profit organizations to transport school-aged children for camps or educational activities. W. VA. CODE § 18-5-13, paragraph (g)(3)(A). Counsel avers that the contractual arrangement between the Extension Service and the Respondent, providing for the transportation of school-aged children to an Energy Express site, is tantamount to a lease of school buses as authorized by CODE § 18-5-13.

West Virginia CODE § 18-5-39 is applicable to summer programs established by county boards of education. Respondent did not establish the Energy Express program. Nor is the Respondent a partner with the West Virginia University Extension Service in the establishment of the Energy Express summer program, as asserted by Grievants. Respondent has no role in ownership, control, management or other indicia partnership with respect to the Energy Express program. Grievants made no showing that Respondent had the authority to dictate transportation arrangements for Energy Express programs. The contractual arrangement between the Extension Service and Respondent, provided for limited transportation of school-aged children to Energy Express sites. The leasing of specific school bus services as authorized by W. VA. CODE § 18-5-13 does not establish the exclusive agreement for all transportation needs of an organization. The fact that equipment and limited services is leased by the Energy Express program does not establish a partnership with Respondent which transforms the program into a county school board program.

For the forgoing reasons, the undersigned finds that Grievants have not demonstrated by a preponderance of the evidence that Respondent is required to employ them as bus operators for the summer program Energy Express operated by the Extension Service of West Virginia University. Grievants did not demonstrate entitlement to the positions. Further, in that it is determined that Grievants have failed to establish entitlement to relief pursuant to the merits of this grievance, it is not necessary to address the viability of the relief requested.

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, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. W. VA. CODE § 18-5-39 is applicable to summer programs established by West Virginia county boards of education. Respondent, a West Virginia county board of education, did not establish the Energy Express program.

3. The Energy Express program is administered by the West Virginia University Extension Service. Grievants made no showing that Respondent, a West Virginia county board of education, had the authority to dictate transportation arrangements for Energy Express programs.

4. West Virginia county boards of education are authorized to lease buses to public and private non-profit organizations and private corporations to transport school-aged children for camps or educational activities. W. VA. CODE § 18-5-13, paragraph (g)(3)(A).

5. The election to obtain transportation services from a source other than the Respondent for one of the program sites was made by West Virginia University Extension Service. The 2008 contractual arrangement between the Extension Service and

Respondent, provided for the transportation of school-aged children to the Coal City site. There was no 2008 contract with Respondent for the Cranberry Prosperity sites.

6. Respondent complied with the provision that its leased buses be operated by bus operators regularly employed by a county board of education. W. VA. CODE § 18-5-13.

7. Grievant failed to establish by a preponderance of the evidence that the facts and applicable law of this matter form a proper basis to grant the relief sought.

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. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: February 10, 2010

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Landon R. Brown
Administrative Law Judge