

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TIMOTHY C. SMITH,
Grievant,**

v.

DOCKET NO. 2015-1624-OhIED

**OHIO COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

This grievance was filed on June 22, 2015, by Grievant, Timothy C. Smith, against his employer, the Ohio County Board of Education. The statement of grievance reads:

WV [C]ode 18A-4-16 & Policy 1610.06 A-N David Zigler (Transportation Director) Violated above code & policy on 4 June 2015 by removing me (a regular driver) from a[n] extra cur[r]icular trip.¹ He allowed a sub-driver (Nancy Smith) to take the trip. I was Bus #1 for this trip. Bus # 2 was allowed to remain on trip. 2 subs were dispatched to cover her regular run.

The relief sought by Grievant is “[t]he highest number of hours paid (regular time and overtime) paid either to sub or other driver.”

A conference was held at level one on July 2, 2015, and a decision denying the grievance at that level was issued on that same date.² Grievant appealed to level two on

¹ The assignment in question was an extra-duty trip, not an extracurricular assignment.

² W. VA. CODE § 6C-2-3(n)(2) states that grievance decisions “shall be dated, in writing, setting forth the reasons for the decision or outcome and transmitted to the parties If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level.” The level one decision which is part of this record is not signed, does not indicate who wrote it other than the initials PSC, nor does it contain an appeal paragraph.

July 11, 2015, and a mediation session was held on November 13, 2015. Grievant appealed to level three on November 18, 2015. A level three hearing was held before the undersigned on March 7, 2016, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Patrick S. Casey, Esquire, Casey & Chapman, PLLC. This matter became mature for decision on April 18, 2016, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was awarded a three-day extra-duty assignment. In order to complete this assignment, however, he would miss at least one day of work, and a substitute would have to be employed to cover his regular bus run. No substitute bus operator accepted Grievant's regular bus run, and Grievant was told he could not drive the extra-duty run. A substitute bus operator who had declined to take Grievant's regular bus run accepted the extra-duty assignment. A second bus was needed to transport students for the three-day extra-duty assignment, and the regular bus operator who had received the assignment was told if she could find a substitute to drive her regular bus route, she could drive the extra-duty assignment, and she did so. No one told Grievant he had this option. Grievant had priority in the assignment over the second regular driver, and was entitled to the extra-duty assignment over her.

The following Findings of Fact are made based on a preponderance of the evidence presented at the level three hearing.

Findings of Fact

1. Grievant is employed by the Ohio County Board of Education (“OCBOE”) as a bus operator.

2. Respondent put a three-day extra-duty bus run on the trip board for a trip to Charleston, West Virginia, transporting students to the Special Olympics, from June 4 through 6, 2015. June 4, 2015, was a Thursday. Two buses were required for this trip.

3. The extra-duty list contains the names of the regular bus operators in order of seniority, and extra-duty trips are rotated among the bus operators in order of seniority. Grievant was the next in line on the extra-duty list to accept the Special Olympics trip, and Elizabeth Finsley was the next in line on the extra-duty list to accept driving the second bus on the Special Olympics trip. Grievant and Ms. Finsley accepted the Special Olympics extra-duty trip.

4. Once a bus operator in Ohio County accepts an extra-duty trip, if the bus operator’s regular run must be covered by a substitute while the bus operator makes the extracurricular trip, substitute bus operators are called and asked if they will cover the regular run.

5. Substitute bus operators employed by Ohio County may decline to accept a regular bus run for any reason or no reason when they are called.

6. No substitute bus operator would accept Grievant’s regular run, and he was not allowed to make the extra-duty Special Olympics three-day trip.

7. Ms. Finsley was told by Transportation Department secretary Cindy Bayne that if she could find someone to make her regular bus run, she could take the Special Olympics trip. Ms. Finsley asked two OCBOE Mechanics if they would cover her regular

run, and they agreed to do so, with one of the Mechanics taking her run in the morning, and the other taking the afternoon run.

8. OCBOE bus operators are not required to ask substitute bus operators to make their regular run for them.

9. Grievant was not told that he could attempt to find someone to cover his regular run so he could take the extra-duty trip, and he was not aware that other bus operators were doing so.

10. Ms. Finsley was allowed to drive the extra-duty Special Olympics trip. She was paid for approximately 16 hours for June 4, 15 hours for June 5, and 10 hours for June 6, 2015, for this trip.

11. Nancy Smith is a substitute bus operator for OCBOE. Ms. Smith declined to accept Grievant's regular bus run when she was called. When Grievant was told he could not take the extra-duty Special Olympics trip because no substitute had accepted his regular route in his absence, Ms. Smith was offered the Special Olympics trip and accepted it.

12. OCBOE substitute bus operators who decline an offered assignment are placed at the bottom of the substitute rotation list. During the 2014-2015 school year, OCBOE bus operators were told they could be removed from the substitute list if they did not drive at least 10 times.

13. OCBOE has a policy in place entitled "Method of Assigning Extra-Duty Trips to Bus Operators," Policy 6010.06. That Policy states in section D that an "extra-duty trip declined by all eligible bus operators shall be offered to a substitute bus operator by rotating seniority." The Policy provides in section I that when a bus operator accepts a trip,

he is entitled to a minimum of two hours pay, even if the trip is canceled with less than 24 hours' notice. The Policy states at section J, however, that "[a] bus operator accepting an extra-duty trip for Saturday or Sunday shall be entitled to a half-day minimum (four hours), or if he/she works more than 3 ½ hours, he/she shall be entitled to a full day minimum (eight hours)."

14. Grievant was paid for two additional hours for the loss of the extra-duty assignment.

15. Policy 6010.06 states at section L that "[e]xtra-duty trips that require two or more buses shall be designated as bus #1, bus #2, etc., at the time of the assignment. Should one of the buses be cancelled or sent back early, it should be the highest numbered bus, with bus #1 being the final bus to complete the trip."

Discussion

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). "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 employee has not met his burden. *Id.*

Extra-duty assignments are irregular jobs that occur "periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival

trips.” W. VA. CODE § 18A-4-8b(f)(1). This CODE Section describes how extra-duty assignments are to be made, stating in § 8b(f)(2) that:

(A) A service person 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 employees have had an opportunity to perform similar assignments. The cycle is then repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

In this case, the extra-duty trip in question conflicted with Grievant’s regular assignment. This Grievance Board has previously found that, with regard to extracurricular assignments, “it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when ‘legitimate questions existed as to Grievant’s logistical ability to perform the run[.]’” *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *See Smith v. Putnam County Bd. of Educ.*, Docket No. 99-40-058 (Apr. 2, 1999). The Administrative Law Judge in *McClung v. Nicholas County Board of Education*, Docket No. 02-34-223 (September 16, 2002), stated that “[t]he same logic would apply to extra-duty runs. If Grievant were permitted to take an extra-duty run that interfered with his regular run, a substitute would be needed for his regular run, he would be required to use his leave for the part of his regular run he did not perform, and in general the needs of both his employer and the students would be less efficiently and safely met. WEST VIRGINIA CODE § 18A-4-8b(f) only requires the most senior employee be given *priority* in making the assignment, and that requirement is met by Respondent’s policy of fi[r]st checking to see

if the most senior employee is available. That CODE section does not require unconditionally that the most senior [employee] be given the assignment.” (Emphasis in original.)

While the undersigned personally finds it unfair that a substitute bus operator could decline to accept Grievant’s regular route, and then accept a more lucrative three-day assignment instead, nothing in the applicable statutory provisions requires a county board of education to obtain a substitute to fill Grievant’s regular route in order to allow him to instead take an extra-duty assignment. The undersigned would note that WEST VIRGINIA CODE § 18A-4-15, which provides for the employment of substitute school personnel, does not state that such persons may be employed to perform extra-duty assignments if they have not obtained regular employee status. See *Bays v. Putnam County Bd. of Educ.*, Docket No. 95-40-096 (July 21, 1995). This Grievance Board further found in *Liptrap, et al., v. Putnam County Board of Education*, Docket No. 07-40-315 (October 1, 2008), that “[i]nsofar as portions of Policy T.3.8 permits short-term substitutes to take extra-duty runs, such portions must be found void and unenforceable in light of *Bays* and the jurisprudence therein.” However, whether a substitute may be employed to perform such assignments is not the issue here. The issue rather is that Grievant’s regular bus run interfered with the extra-duty assignment.

As Grievant pointed out, he did have priority over Ms. Finsley in driving one of the buses, regardless of how the substitutes were obtained for Ms. Finsley’s regular bus route. Grievant, however, testified that he had told Ms. Finsley he would let her have the trip ahead of him if she was not high enough on the rotation list to be awarded the trip, because Ms. Finsley’s son was participating in the Special Olympics. Whether he would

have actually done so had the situation been presented to him is speculation. The legal issue is whether OCBOE should have sent Grievant on the trip rather than Ms. Finsley. The undersigned concludes that OCBOE should have done so, as Grievant had priority in the assignment over Ms. Finsley.³

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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.

2. “WEST VIRGINIA CODE § 18A-4-8b(f) only requires the most senior employee be given *priority* in making the assignment, and that requirement is met by Respondent’s policy of fi[r]st checking to see if the most senior employee is available. That CODE section does not require unconditionally that the most senior [employee] be given the assignment.” *McClung v. Nicholas County Bd. of Educ.*, Docket No. 02-34-223 (Sept. 16, 2002).(Emphasis in original.)

3. This Grievance Board has previously found that “it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when

³ Grievant also argued that section L of Policy 6010.06 provides that he should have been the bus operator to take the trip if only one regular bus operator was able to take the extra-duty trip. That section, however, addresses what happens if one of two buses is cancelled or is “sent back early.” Neither of the bus trips was cancelled or sent back early. Grievant being told he must perform his regular run which conflicts with the extra-duty assignment does not bear any resemblance to the cancellation of a trip, despite the fact that Grievant was paid for two hours, which per the Policy is required if a trip is cancelled.

'legitimate questions existed as to Grievant's logistical ability to perform the run[.]'" *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); See *Smith v. Putnam County Bd. of Educ.*, Docket No. 99-40-058 (Apr. 2, 1999).

4. Grievant demonstrated that he was entitled to priority over the other regular bus operator who performed the extra-duty assignment.

Accordingly, this grievance is **GRANTED**. Respondent is directed to pay Grievant for the additional hours beyond two hours he would have worked had he performed the three-day extra-duty assignment on June 4 through 6, 2015, at the applicable rate, utilizing the number of hours worked those three days by Nancy Smith.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 12, 2016

BRENDA L. GOULD
Administrative Law Judge