BEFORE THE WEST VIRGINIA SUPREME COURT OFAPPEALS

Docket No. 22-0234

THE BOARD OF EDUCATION
OF THE COUNTY OF WYOMING,

Petitioner,

v.

MARY DAWSON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR APPEAL

Rebecca A. Roush, Esquire (WVSB #8849)
General Counsel – West Virginia School Service Personnel Association
1610 Washington Street East
Charleston West Virginia 25311
Phone: (304)346-3544
Email: rroush@wvsspa.org

BEFORE THE WEST VIRGINIA SUPREME COURT OFAPPEALS

Docket No. 22-0234

THE BOARD OF EDUCATION
OF THE COUNTY OF WYOMING,

Petitioner,

v.

MARY DAWSON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR APPEAL

Comes now the respondent, Mary Dawson ("Ms. Dawson" or "Employee" or "Respondent"), by counsel, Rebecca A. Roush (WVSSPA[1]), and submits her *Brief in Opposition to Petition for Appeal* respectfully requesting this Honorable Court to DENY and DISMISS the *Petition for Appeal* heretofore filed herein by the Petitioner, The Board of Education of the County of Wyoming ("Petitioner" or "Board"), and to enter an order AFFIRMING the Decision of the Kanawha County Circuit Court dated March 4, 2022. This *Order* affirmed the West Virginia Public Employees Grievance Board dated September 18, 2018, which granted the Employee's grievance and ordered the Board to reinstate her to her regular bus run as it was prior the changes made by the Board on September 9, 2017. The ALJ further Ordered the Wyoming County Board of Education to reinstate Ms. Dawson to the vocational bus run that she had performed for the Board since 1985, and to pay her back pay from the time she was removed from her vocational bus run in 2017, until the time she is reinstated, plus interest, with offset to the Board for

[1] West Virginia School Service Personnel Association

compensation earned on other extracurricular bus runs, on the grounds that the *Petition for Appeal* is without merit.

EXECUTIVE SUMMARY

The three arguments Petitioner has advanced in support of its *Petition for Appeal* fail for the same reason. The arguments are identified in Petitioner's brief as follows: (1) that "[t]he Circuit Court Judge and ALJ erred in failing to conclude that a mistake was made"; (2) that "[t]he Circuit Court Judge and ALJ erred in finding the mistake could not be corrected if not so corrected within a certain, unidentified, time frame"; and (3) that "[t]he Circuit Court Judge and ALJ erred in concluding that personnel statutes are, or cannot be, contravened to correct a mistake." All three of Petitioner's arguments rise and fall on the same factual premise -- that a "mistake" occurred. More specifically, according to Petitioner, Ms. Dawson was only able to perform both her regular and vocational bus runs for more than thirty-one (31) consecutive years ***as the result of a "mistake" made by the Board***, which it suddenly realized in 2017. Petitioner failed to meet its burden of proof on a material issue to its defense.

Petitioner asserted the theory of "mistake" as an affirmative defense to Ms. Dawson's grievance presented below to *both* the Circuit Court and ALJ. Petitioner, not Ms. Dawson, had the burden of proof with regards to its affirmative defense. Simply stated, Petitioner failed to prove that a "mistake" occurred. Because Petitioner failed to prove that a "mistake" occurred, Petitioner's second argument fails as well. In other words, Petitioner can make no argument that it has a right to correct a "mistake" unless it has first proven that a "mistake" actually occurred.

Notably, Petitioner now attempts to buttress its "mistake argument" by referring to a "substantial change" being made to Ms. Dawson's regular bus run without Board approval. However, there is no evidence in the record to support a finding or conclusion that any change made to Ms. Dawson's regular bus run was "substantial." To the contrary, the change was so insignificant that it raised no issues for three decades and was only addressed by the Board because another employee thought Ms. Dawson had gotten a "deal" more than thirty years ago. Nonetheless, to prevail on its affirmative defense of "mistake," Petitioner had the burden to prove that a substantial change resulting in a mistake and necessitating Board approval actually occurred. Petitioner failed to do so.

In reaching her *Decision*, the Circuit Court properly affirmed the ALJ's finding that Ms. Dawson had been performing both the regular and vocations bus runs for thirty-one years, and that the Board had no legal right to suddenly change her schedule without her consent and to strip her of the vocational bus run she had held for thirty-one (31) years.[2] Ms. Dawson's statutory rights under W.Va. Code §§ 18A-4-8(j), 18A-4-8(m) and 18A-4-16(6) had been violated and that Petitioner could not violate Ms. Dawson's statutory rights to action that it deemed necessary to correct a "mistake" that it failed to prove.

Because the Board failed to meet it burden of proof as to its affirmative defense of "mistake" asserted in this matter, the Order of the Circuit Court should stand and be affirmed by this Court.

---

[2] Ms. Dawson has been employed as a bus operator for more than 38 years and is the most senior bus operator in Wyoming County.

STANDARD OF REVIEW

The West Virginia Supreme Court reviews decisions of the Circuit Court under the same standard as that by which the Circuit Court reviews the decision of the ALJ." West Virginia Code § 6C-2-5(b) sets that standard and explains the elevated burden an appellant must meet: A party may appeal the decision of the administrative law judge on the grounds that the decision: (1) Is contrary to law or a lawfully adopted rule or written policy of the employer; (2) Exceeds the administrative law judge's statutory authority; (3) Is the result of fraud or deceit; (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. As the Court held in Syllabus Point 1 of *Cahill v. Mercer County Board of Education*, [208 W. Va. 177, 539 S.E.2d 437 (2000)] review is part plenary and part deferential: [g]rievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an Administrative Law Judge, a Circuit Court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an Administrative Law Judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are de novo.

Further, the West Virginia Supreme Court has previously held that "[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C-2-1], et seq. [ ], and based upon findings of fact, should not be reversed unless clearly wrong." [Syl. Pt. 3, *Armstrong v. West Virginia Division of Culture and History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (citing Syl. Pt. 1, *Randolph County. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989)]. *Wilfong v. Randolph County. Bd. of Educ.*, 243 W. Va. 25, 28-29, 842 S.E.2d 229, 232-33 (2020).

ARGUMENT

Petitioner's entire case rests on its assertion that a "mistake" occurred in 1987 or 1988, two to three years after the Board assigned a vocational run to Ms. Dawson to perform in addition to her regular bus run. The uncontroverted evidence is that Ms. Dawson successfully performed both her regular run and her vocational run for two to three years. Suddenly in 2017, the Board's Superintendent asserted that Ms. Dawson's regular bus run had been altered in 1987 or 1988 and that the same was a mistake that necessitated correction. The Board failed to meet its burden of proof to establish that whatever changed in 1987 or 1988 was anything more than a slight change to Ms. Dawson's bus runs. The Board failed to meet its burden of proof to establish that a mistake occurred.

While the Board gratuitously argues in its brief that the change was "substantial," there was no evidence presented to support a finding that the change was substantial. Accordingly, the ALJ did not find that a substantial change occurred that might give rise to an actual "mistake." Slight modifications to bus runs are permissible and they do not require formal consent and approval of the employee or the county board of education.

In an effort to persuade this Court, Petitioner asserts that there was a "substantial change in the bus route of the respondent and the other bus operator." (Petitioner's Brief, p. 9). This assertion is unsupported by the record. Moreover, slight alterations of a bus operator's driving schedule during a school year may be necessary due to need. Smith v. Lewis County Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988). Such alternations are not per se violations of Code § 18A-4-8a; such alterations must be analyzed on a case-by-case basis. Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992). In fact, a county board of education must have freedom to make at least reasonable, small changes to a bus operator's daily work schedule within the parameters of his contract, many of which cannot reasonably be affected until shortly

before school starts for pupils in any given year, at the earliest. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989). See also, Rex Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-099 (March 31, 1995).

There was absolutely no evidence presented by the Board sufficient to support a finding by the ALJ that a "substantial change" to anyone's bus route occurred to rise to the level of a "mistake." To the contrary, the evidence supports the conclusion that the change, if any, was so minor and insignificant that it did not affect anyone or cause any problems for more than thirty-one (31) years. There is no evidence that the students were not properly transported between origination and destination. There was no evidence that Ms. Dawson had failed to satisfactorily perform her job. Petitioner simply failed to meet its burden of proof.

Despite the fact that Ms. Dawson had successfully performed her regular and vocational run assignments for more than thirty-one (31) years, Petitioner asserts that a "mistake occurred in 1987 or 1988 and that it was entitled to "correct the mistake" in 2017. Ms. Dawson contends that no "mistake" was made. Instead, the record demonstrates that Ms. Dawson completed her regular and vocational bus runs for more than thirty-one (31) years, with the knowledge and consent of the Board. If not, who did the Board think was transporting its students? The ALJ properly concluded that the Board incorrectly stripped Ms. Dawson of the vocational bus run she had held for thirty-one (31) years and which she had performed along with her regular bus run for the same time period.

As noted by the ALJ in her findings of fact, the purported "mistake" was suddenly recognized in 2017. Findings of Fact 13 provides the factual background for the same, to-wit: "Around this time [the Spring of 2017], another employee, who was bidding on a different run, asked for a "deal" like that of Grievant's, explaining that a portion of Grievant's morning run ***had***

been assigned to another driver years prior so that Grievant could continue to drive her vocational run. This comment prompted an investigation into Grievant's bus run." (emphasis added). Nothing in this complaint indicates that the change was substantial. Next, an investigation was conducted by Jeffrey Hylton, Director of Safety and Transportation. Mr. Hylton found that Ms. Dawson "was awarded the vocational run effective October 14 , 1985." See, Findings of Fact No. 14. "After his investigation, ***Mr. Hylton concluded*** that . . . [the change] in 1987 or 1988 was a mistake. Accordingly, Mr. Hylton changed Grievant's regular bus run back to what it had originally been before the start times of the schools change . . . ." (emphasis added). See, Findings of Fact No. 17. Based upon Mr. Hylton's own investigation, it appears that the start times of the schools were changed at some point, and that he nonetheless reverted Ms. Dawson's assignment to the schedule as it existed prior to the change. Id. This is problematic for the Board because Ms. Dawson did not change the start times of the schools. The Board did. Moreover, once the school start times were changed, it would have been the Board who caused any adjustment to the bus run assignments. In other words, the change to Ms. Dawson's bus run assignment resulted from the Board's action to change the start times of the schools. This is permissible, because slight changes to bus assignments do not require formal Board approval and they do not require the employee's consent. In the event Petitioner sought to prove that the change was of the nature that required Board approval, it failed to do so.

Another telling point from Mr. Hylton's investigation is his finding that Ms. Dawson ***did perform both her regular bus run and her vocational bus run*** from 1985 (when the vocational bus run was originally assigned to her) to "1987 or 1988" (when the purported "mistake" was made vis-à-vis a change her regular bus run). In other words, she ***was*** able to and did perform both runs for two to three years. This finding supports the conclusion that it was the Board, not Ms. Dawson,

who made a change that impacted Ms. Dawson's regular bus run. The obvious conclusion is that it was the Board's action changing the school start times. No one complained about the changes made to the bus run assignments for three decades, because the changes were slight and did not require Board approval. The Board could have and should have informed the employee raising the issue in 2017 that there was no "deal" made in 1987 or 1988, because the Board certainly presented no evidence of any such deal to the ALJ.

The Circuit Court Judge properly affirmed ALJ in concluding that Ms. Dawson's statutory rights under W.Va. Code §§ 18A-4-8(j), 18A-4-8(m) and 18A-4-16(6) had been violated and that Petitioner could not violate Ms. Dawson's statutory rights to action that it deemed necessary to correct a "mistake" that it failed to prove. The Board was not permitted to change Ms. Dawson's work schedule or to relegate her conditions of employment without her consent. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzano, 163 W.Va. 454, 256 S.E.2d 592 (1979); Brum v. Bd. of Educ., 215 W.Va. 372, 599 S.E.2d 795 (2004).

CONCLUSION

The *Petition for Appeal* should be denied and dismissed, because the Order of the Circuit Court dated March 4, 2022, affirming *Decision* of the ALJ was properly made upon the evidence presented. Petitioner simply failed to meet its burden of proof to establish the affirmative defense of "mistake." Petitioner attempts to argue that the change made was "significant' and thus necessitated Board approval. However, Petitioner failed to demonstrate that the change was, in fact, significant. The uncontroverted facts of the case indicate the contrary (i.e., that the change was insignificant). Indeed, the change was so slight that it garnered no attention for three decades.

Then, it only drew attention when another employee sought a "deal" like that given to Ms. Dawson long ago. No evidence of any "deal" was presented upon appeal.

Because Ms. Dawson successfully performed both her regular bus run and her vocational bus run between 1985 and 1987 or 1988, logic would dictate that some other change occurred in 1987 or 1988 that caused a slight change to Ms. Dawson's regular bus run. The evidence presented reveals that the change occurring at that time was a change to the school start times. In other words, the change that occurred ***was*** Board approved. The Board should not be permitted to now force Ms. Dawson to revert to a schedule that pre-dates the Board's own change to the school start times.

The uncontroverted facts are that Ms. Dawson transported students for the Board as part of both her regular and vocational bus runs for more than thirty-one (31) years. The Board asserted, but failed to prove, that a change to Ms. Dawson's regular bus run rose to the level of a mistake warranting correction that would in turn violate her statutory rights. The law is clear that slight alterations of a bus operator's driving schedule during a school year may be necessary due to need. Smith v. Lewis County Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988). School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzano, 163 W.Va. 454, 256 S.E.2d 592 (1979); Brum v. Bd. of Educ., 215 W.Va. 372, 599 S.E.2d 795 (2004). The *Petition for Appeal* should be denied and dismissed, because the Board failed to demonstrate that the ALJ committed any reversible error.

For the reasons stated hereinabove, Respondent requests that this Honorable Court DENY and DISMISS the *Petition for Appeal* heretofore filed herein by the Petitioner, and to enter an order AFFIRMING the Order of the Circuit Court dated March 4, 2022. The Circuit Court affirmed the *Decision* of the West Virginia Public Employees Grievance Board dated September 18, 2018,

rendered in the matter of Mary Dawson v. Wyoming County Board of Education, Docket No. 2018-0424-WyoED, and for such other relief as the Court deems just and proper.

MARY DAWSON
BY COUNSEL,

s/Rebecca A. Roush/
Rebecca A. Roush Esq. (WVSB #8849)
General Counsel – WVSSPA
1610 Washington Street, East
Charleston, West Virginia 25311
T: 304.346.3544
F: 304.346.3548
E: rroush@wvsspa.org

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 22-0234

THE BOARD OF EDUCATION
OF THE COUNTY OF WYOMING,

Petitioner,

v.

MARY DAWSON,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August 2022, I served the foregoing **BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR APPEAL** upon the following by mailing a true and exact copy thereof in a properly stamped and addressed envelope as follows:

Joshua Cottle, Esquire
BOWLES RICE, LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
Counsel for Wyoming County Board of Education

s/Rebecca A. Roush/
Rebecca A. Roush, Esq. (WVSB #8849)
General Counsel – WVSSPA
1610 Washington Street, East
Charleston, West Virginia 25311
T: 304.346.3544
F: 304.346.3548
E: rroush@wvsspa.org