REX TONEY,

Grievant,

v. DOCKET NO. 95-22-118

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rex Toney, filed this grievance in September 1994, alleging violations of W. Va. Code §§ 18A-4-16, 18A-2-7, and 18A-2-8, in regard to the termination of his supplemental contract of employment as a vocational driver for Harts High School. Following adverse decisions at the lower levels, Grievant advanced an appeal to Level IV on or about March 24, 1995. A hearing was conducted on May 26, 1995, at which time this case became mature for decision.

The facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been employed for approximately 18 years as a bus driver for Respondent Lincoln County Board of Education.

2. On January 25, 1994, Grievant was, by Board action, issued a Supplemental Contract of Employment as a Vocational Driverfor Harts High, the period of assignment retroactive from "September 1, 1993 until terminated." G Ex. 1, 2.

3. Prior to the 1993-94 school term, another bus driver, Teddy John Thompson, had a continuing contract of employment for the Harts High vocational run that is the subject of this grievance.

4. John Thompson was off on Workers' Compensation due to a work-related injury from May 16, 1991 until January 17, 1994.

5. While he was off on Workers' Compensation in 1991, Thompson bid on a regular run, which

he was awarded. The regular run rendered him ineligible for the supplemental vocational run because of a scheduling conflict.

6. During the time he was off on Workers' Compensation, a substitute driver drove Thompson's regular run.

7. A substitute also drove the vocational run for awhile, but in 1993 Grievant was given the above-referenced supplemental contract for that run.

8. The vocational run was not posted. Johnny Adkins, Director of Transportation, asked Assistant Superintendent Larry Prichard to give Grievant the supplemental contract for the vocational run. He did so because he believed Grievant was the most senior bus driver at the time and would have gotten the run if he had bid on it. As it turned out, Grievant was not the most senior bus driver.

9. When Thompson returned to work in March, 1994, he filed a grievance over the assignment of the vocational run to Grievant. Thompson alleged various statutory violations with respect to the vocational run, including the elimination of his continuing contract without notice, and the assignment of the run without posting. Grievant did not intervene in Thompson's grievance.

10. By a Level II decision dated June 6, 1994, Respondent granted Thompson's grievance and ordered the vocational run returned to him, provided he could make both the vocational run and his regular run within the time restraints allotted. It was determined that Thompson could make both runs, and he was therefore awarded the vocational run. R Ex. 1.

11. Grievant was informed by Mr. Adkins at the beginning of the 1994-1995 school term that Thompson would be driving the vocational run, and that his supplemental contract of employment was terminated.

12. Grievant's supplemental contract of employment was terminated by Board action on October 17, 1994, effective August 26, 1994, for lack of need. G Ex. 3.

Discussion

Grievant alleges that Respondent violated various statutes in terminating his supplemental contract of employment for the vocational run, specifically, W. Va. Code §§ 18A-4-16, 18A-2-7, and 18A-2-8. (See footnote 1) Respondent argues that it did not violate any statutes,rules or procedures with respect to the termination of Grievant's supplemental contract of employment. The undersigned agrees with Respondent.

Grievant filed this grievance after Thompson was placed in the vocational driver position, challenging Thompson's placement and the termination of his supplemental contract of employment. Grievant was not a party to, nor did he intervene in, Thompson's grievance challenging Grievant's placement into the vocational run position. Thus, Grievant cannot employ the grievance procedure to attack the final decision in the Thompson case. See Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7,1991). Finality is desirable in the law, and the Board's placement of Thompson into the vocational run position was done in its capacity of a grievance evaluator, not as an employer. Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990). The Board's initial placement of Grievant into the vocational run position was wrong. The Superintendent recognized the error as a result of the grievance filed by Thompson. The Superintendent was acting as a grievance evaluator at Level II, when he sought to correct the earlier error by placing Thompson into the position. Grievant cannot now challenge that action.

Conclusions of Law

1. The actions of a board of education as employer on one hand and as grievance evaluator on the other are separate and distinct. Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991).

2. An employee cannot successfully grieve a county board of education's actions in reasonably and correctly implementing a decision on an earlier grievance. Gillman, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: June 30, 1995

Footnote: 1 *W. Va. Code §§ 18A-2-7 and 18A-2-8, which deal with the "assignment, transfer, promotion, demotion, suspension and recommendation of dismissal" and "suspension and dismissal" of school personnel, respectively, are inapplicable to this grievance. Grievant has not been assigned, transferred, promoted, demoted, suspended or dismissed from his position as bus operator; thereforethose claims are denied.*

Although it is unclear whether Respondent considers vocational bus runs to be extracurricular assignments, Grievant has alleged a violation of that section of W. Va. Code § 18A-4-16, and the undersigned presumes that is the applicable section. Code § 18A-4-16 governs extracurricular assignments, and provides that (1) extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative; (2) the employee and the superintendent shall mutually agree upon the number of hours of the assignment; (3) the terms and conditions of the assignment shall be in writing; and (4) the employee's regular contract of employment shall not be conditioned upon the employee's acceptance or continuation of an extracurricular assignment.

Grievant and the Board agreed upon the extracurricular assignment, the terms of which were in writing. No evidence was presented that Grievant's regular contract of employment was conditioned upon his acceptance or continuation of the extracurricular assignment. There is no evidence that the Board violated this Code section; therefore, that claim is also denied. While the undersigned questions the terms of a contract that specify a certain date "until terminated", that issue was not raised in this grievance and will not be discussed in this decision.