THOMAS BOWMAN,

Grievant,

v. **Docket No. 96-24-261**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Thomas Bowman (Grievant) filed this grievance under W. Va. Code §§ 18-29-1, et seq., on March 1, 1996, complaining that Respondent Marion County Board of Education (MCBE) improperly reduced the term of his extracurricular bus run without providing proper notice under W. Va. Code §§ 18A-2-6 or 18A-2-7 when it postponed the commencement of his bus run from February 5, 1996, to March 4, 1996. Following denial of the grievance at Level I, Grievant appealed to Level II where a hearing was conducted on May 20, 1996. Following an adverse Level II decision issued by the Superintendent's designee, Ronald Wood, on June 17, 1996, Grievant by-passed Level III in accordance with W. Va. Code § 18-29-4(c), appealing to Level IV on June 25, 1996. After a series of continuances, each of which was granted for good cause shown, a Level IV evidentiary hearing was held in Fairmont, West Virginia, on December 6, 1996. As agreed at the conclusion of that hearing, this matter became mature for decision upon receipt of the parties' written post- hearing arguments on December 23, 1996. The facts which are dispositive of this grievance are essentially undisputed. Accordingly, the following Findings of Fact are derived from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is employed by the Marion County Board of Education (MCBE) as a regular school bus operator, a school service personnel position.

2. In addition to a regular morning bus run transporting students from home to school and a

regular afternoon bus run transporting students home from school, Grievant is employed to operate a mid-day bus run transporting vocational education students in the Nurse's Aide/Medical Assistant Program from the Marion County Vo-Tech Center to various sites in and around the city of Fairmont, West Virginia (Vo-Tech Run). L II HT at 4-5. See Bd Ex 3 at L II.

3. According to the original posting for the position for the 1991-92 school year, the Vo-Tech Run was to operate daily, between October and May, excluding January and February, from 11:30 a.m. to 2:45 p.m. See Bd Ex 3 at L II.

4. Grievant was compensated at the rate of $5.50 per hour, plus applicable overtime, for driving the Vo-Tech Run. L II HT at 5.

5. During the 1993-94 school year Grievant was notified of a proposed transfer in regard to the Vo-Tech Run for the 1994-95 school year. L II HT at 5-6.

6. On March 21, 1994, Grievant was removed from the transfer list subsequent to executing the following agreement with Roger Perdue, MCBE's Vocational Administrator:

> Due to the uncertainty of funding and the proposed restructuring of the Health Occupations Curriculum, the 1994-95 school year mid-day health clinic bus runs may be eliminated or altered. I have been made aware ofthese possibilities and understand the consequential changes that might occur. I further understand that any changes will not affect my maintaining the position as Mid-day bus driver whether the position remains the same, is altered, or is eliminated.

Bd Ex 4 at L II.

7. As a result of his conversation with Mr. Perdue, Grievant understood that the Health Occupations Curriculum had been changed to the extent that the practicum portion requiring transportation would not thereafter commence until the first Monday in February. (See footnote 1) Consistent with this understanding, the 1995-96 Vo-Tech Run would have ordinarily commenced on February 5, 1996.

8. During the 1994-95 school year, the only previous year in which the new curriculum was in effect, the Vo-Tech Run began on February 6, 1995. See Bd Ex 2 at L II.

9. Prior to March 1, 1996, MCBE had not issued Grievant a written contract for the Vo-Tech Run. L II HT at 5. 10. The Nurse's Aide/Medical Assistant Program is part of a Health Occupations Curriculum that involves classroom instruction, followed by practical application in a work environment.

11. During the 1995-96 school year, as of February 1, 1996, ten days of classroom instruction, including seven days in January 1996, were cancelled due to bad weather (snow). As a result, the course instructors determined that the students in the Nurse's Aide/Medical Assistant Program were not ready for the practical portion of their training.

12. In late January 1996, Grievant was verbally advised that the Vo-Tech Run would not commence on the first Monday in February.

13. Grievant began driving the Vo-Tech Run for the 1995-96 school year on March 4, 1996.

DISCUSSION

This grievance involves an extracurricular assignment subject to W. Va. Code § 18A-4-16 (1995) which provides:

> (1) The assignment of teachers and service personnel to extracur ricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.
>
> (3) The terms and conditions of the agreement between the employee and the board of education shall be in writing and signed by both parties.
>
> (4) An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board.
>
> (5) The board of education shall fill extracurricular and supplemental assignments and vacancies in accordance with section eight-b [§ 18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

It is well established that county boards of education must utilize the notice and hearing procedures of W. Va. Code §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental assignment under W. Va. Code § 18A-4-16, unless the assignment expires under its own terms. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Ramey v. Lincoln County Bd. of Educ., Docket No 94-02-002 (June 3, 1994). See Garvin v. Webster County Bd. of Educ., Docket No. 92-51- 407 (Jan. 7, 1993); Lambert V. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). Grievant contends that in accordance with this Grievance Board's ruling in Doss, MCBE erred when it failed to either notify him that the duration of his extracurricular contract would be reduced, or to include language in his contract to provide for the contingency which arose in this matter. MCBE submits that this Board's Ramey decision controls the outcome of this dispute. This Board's decisions in Payne, Doss, and Ramey were all predicated upon the decision of the West Virginia Supreme Court of Appeals in Smith. In that case, the extracurricular contract of a head football coach was terminated by a vote of the board of education without any prior notice or hearing. The Court concluded that the procedural requirements in W. Va. Code § 18A-2-7 relating to "transfer" must be applied when terminating an employee's extracurricular contract under § 18A-4-16. See Syl. Pt. 2, Smith, supra.

In Ramey, the grievant was a bus operator who held a "supplemental" (extracurricu lar) (See footnote 2) 2 contract to transport a single handicapped student to and from school on a daily basis for the "1992/93 school year or as long as required by IEP." (See footnote 3) After the beginning of the school year, the student's health deteriorated to the point where he could no longer be transported to school by bus. Ramey held that once the IEP was changed to eliminate the requirement for bus transportation, the grievant's extracurricular contract ended in accordance with its terms. Accordingly, Ramey does not directly control this grievance because Grievant had no written contract of employment explicitly covering the circumstance at issue.

Doss likewise dealt with a bus operator's mid-day extracurricular run. There, the Board of Education terminated the employee's bus run in November of the 1995-96 schoolyear after it revised its special education program to comply with state regulations governing programs for handicapped children. This program change eliminated any further requirement for mid-day transportation.

Although the employee was transporting handicapped students during the 1994-95 and 1995-96 school years, his last written extracurricular agreement was for the 1992-93 school year, when he was still driving a "Kindergarten run." Doss, supra. Therefore, this Grievance Board refused to extend the benefit of the Ramey holding to a county board which had failed to issue a properly worded contract to its employee. Id.

While MCBE similarly failed to issue a written agreement to Grievant, Doss is distinguishable because no provision in the original posting or Grievant's conversations with Mr. Perdue addressed the specific situation which arose in this grievance. Further, in Smith and Doss, the employees' extracurricular contracts were permanently and completely terminated. In this case, MCBE reduced Grievant's extracurricular contract by one month for the 1995-96 school year only. (See footnote 4) Accordingly, in these circumstances, the notice of transfer provisions in W. Va. Code § 18A-2-7 are not applicable to the action being grieved. It is further noted that W. Va. Code § 18A-2-7 provides a specific exemption from its notice of transfer provisions "in emergency situations where the school building becomes damaged or destroyed through an unforeseeable act and which act necessitates a transfer of such school personnel." In this case, MCBE had no requirement for Grievant to drive the Vo-Tech Run in February 1996 because of an academic decision that the students participating in this vocational training were not prepared to proceed to the practicum portion of their curriculum. This decision was a direct result of an unforeseen circumstance substantially beyond MCBE's control, the number of days classes were cancelled due to bad weather. When a situation arises that is not specifically governed by the school personnel laws, or the terms of the employee's contract, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

In this case the county board could not have reasonably foreseen that it would encounter so many weather-related class cancellations as to necessitate postponing the practicum portion of the curriculum, thereby reducing the term of the Vo-Tech Run driven by Grievant. Accordingly, the undersigned is persuaded that, based on the particular facts and circumstances in evidence, unforeseen circumstances arose which operated to supersede the terms of Grievant's extracurricular contract. Thus, Grievant is not entitled to compensation for the days he was not needed to drive in February 1996.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. A grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Terminations of extracurricular contracts entered into pursuant to W. Va. Code § 18A-4-16 are subject to the procedural requirements mandated under W. Va. Code §§ 18A-2-7 and 18A-2-8. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985). See Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

3. Although MCBE failed to issue a written agreement to Grievant in accordance with W. Va. Code § 18A-4-16(3), such failure is not controlling in this dispute because the question presented may not have been included in any written agreement between the parties.

4. Based upon unforeseen circumstances, MCBE did not abuse its discretion, or act in an arbitrary and capricious manner, when it reduced the term of Grievant's extracurricular assignment to drive a mid-day bus run for the 1995-96 school year only, without following the notice and hearing procedures outlined in W. Va. Code § 18A-2-7. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). See generally Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Marion County or to the Circuit Court of Kanawha 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 29, 1997

Footnote: 1

Although W. Va. Code § 18-29-6 provides that "[f]ormal rules of evidence shall not be applied" in proceedings before this Grievance Board, the parol evidence rule may nonetheless be applied to evaluate evidence in the record. See Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). See also Dominguez v. Dept. of the Air Force, 803 F.2d 680, 682 (Fed. Cir. 1986). It is apparent that the document which Grievant signed addressed changes for the 1994-95 school year. The document makes no provision for further changes in the Vo-Tech Run in future years. Thus, Grievant's testimony as to his understanding of the terms of his employment for future school years is not barred under the parol evidence rule, because the document is incomplete as to that question. See, e.g., Glenmark Assoc., Inc. v. Americare, 179 W. Va. 632, 371 S.E.2d 353 (1988); Holiday Plaza, Inc. v. First Fed. Sav. & Loan Ass'n, 168 W. Va. 356, 285 S.E.2d 131 (1981).

Footnote: 2

As noted in Eastham v. Cabell County Board of Education, Docket No. 92-06-397 (Apr. 16, 1993), the terms "extracurricular" and "supplemental" are often used interchangeably, albeit sometimes erroneously. Effective July 1, 1996, W. Va. Code § 18A-4-16(5) was amended to eliminate the reference to "supplemental" assignments. Such assign ments are now either "extracurricular" or "extra duty."

Footnote: 3

An "IEP" is an Individual Education Plan mandated for handicapped students.

Footnote: 4

The parties have not cited any decision where a school employee's extracurricular contract term was reduced. The undersigned is unaware of any grievance where this specific issue has been presented, except Edwards v. Clay County Board of Education, Docket No. 96-08-064 (July 9, 1996). As that grievance was held untimely, the merits of this issue were not addressed. However, it is noted that the notice and hearing provisions of W. Va. Code § 18A-2-6 have been held to apply when a county board of education permanently reduces the term of an employee's regular contract of employment. Bd. of Educ. v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982). See Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994).