HOMER D. CARR,

Grievant,

v. Docket No. 98-31-342

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Homer D. Carr (Grievant) is a bus operator employed by Respondent Monroe County Board of Education (MCBE). He seeks an extracurricular bus run, arguing that he has more seniority than the driver awarded the run.

This grievance was denied at Level I, on August 27, 1998, by Immediate Supervisor Bennie R. Comer. This grievance was denied at Level II, on August 26, 1998, by Superintendent Lyn Guy. As authorized by W. Va. Code § 18-29-4(c), MCBE waived participation at Level III. A Level IV hearing was scheduled before the undersigned Administrative Law Judge at the Grievance Board's Beckley, West Virginia office on November 5, 1998. The parties then decided to submit this matter on the record developed at Levels I and II, and this grievance became mature for decision, upon receipt of the parties' proposed findings of fact and conclusions of law, on December 5, 1998. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. In 1995, Martin Tolliver (Tolliver) bid on and was awarded an “extra-duty” bus run to transport students to and from sports practice. The route was from Gap Mills to Union, to James Madison High School, and return. The time for the year-long run varied with the various sport seasons.

2. Superintendent Lyn Guy posted this bus run again in July of 1996, and July of 1997. Tolliver retained the run.

3. On July 6, 1998, Superintendent Guy again posted this run. Grievant bid on it, but it was

again awarded to Tolliver.

4. Tolliver was never dismissed, transferred, reduced in force, or otherwise removed from this run.

5. Grievant has three days more seniority than Tolliver.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, 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. Grievant seeks the bus run at issue, arguing that he has more seniority than the driver awarded the run, Tolliver. He also requests wages, benefits, and interest. MCBE responds that it erred in posting the run as an extra-duty one, that it is actually an extracurricular run, that it should not have been posted unless it was vacant, and that it was not vacant because MCBE had not removed Tolliver from the position.

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.

"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[.]" W. Va. Code § 18A-4-16.

The run is clearly extracurricular. Although the time for the year-long run naturally varied with the various sport seasons, its route was set at the beginning of the school year, and no evidence suggested that it ever changed. In fact, the run's route never varied during the four years it was

posted. Accordingly, it is not an irregular job that occurs periodically or occasionally, but is instead the sort of chaperoning, escorting, providing support services, and caring for the needs of students, occurring on a regularly scheduled basis, that the statute defines as extracurricular duty. Lambert & Williams v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

A board of education is not required to vacate and repost an extracurricular assignment on an annual basis. Lambert & Williams, supra. However, a board of education is not prevented from vacating and reposting an extracurricular assignment onan annual basis, as long as it adheres to the notice provisions of W. Va. Code §§ 18A-2-6 and/or 18A-2-7. Silva & Silva v. Boone County Bd. of Educ., Docket No. 96-03-527 (July 3, 1997). A board of education is not required repost or fill an extracurricular position when that position's contract expires, under its own terms, in mid-year. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

In order to terminate an extracurricular assignment held by an employee, a county board of education must comply with the procedural requirements of W. Va. Code §§ 18A-2-6, 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. of County of Logan, 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).

As noted above, MCBE was free to annually post the extracurricular run at issue, or not to post it, at its discretion. It chose to post the run, and was therefore required to give Tolliver the notice, stating its cause or causes for removing him, and the opportunity for a hearing, required by W. Va. Code §§ 18A-2-6 and 18A-2-7. Absent a showing that this took place, and the record in this grievance contains none, the undersigned concludes that Tolliver was never removed from this run, that the position was not vacant, and that Superintendent Guy therefore erred in posting it.

A mistake by MCBE's employee, Superintendent Guy, does not bind MCBE. Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989).

Because this extracurricular bus run was not vacant and should not have been posted, Grievant cannot prove, by a preponderance of the evidence, that MCBE improperlyfailed to select him for it.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, a grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. A board of education is not required to vacate and repost extracurricular assignments on an annual basis. Lambert & Williams v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

___3. A board of education is not prevented from vacating and reposting extracurricular assignments on an annual basis, as long as it adheres to the notice provisions of W. Va. Code §§ 18A-2-6 and/or 18A-2-7. Silva & Silva v. Boone County Bd. of Educ., Docket No. 96-03-527 (July 3, 1997.

4. In order to terminate an extracurricular assignment held by an employee, a board of education must comply with the procedural requirements of W. Va. Code §§ 18A-2-6, 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. of County of Logan, 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).

5. The mistaken posting of an extracurricular bus run does not bind a board ofeducation. See Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989).

6. Grievant failed to prove, by a preponderance of the evidence, that MCBE improperly failed to select him for an extracurricular bus run.

Accordingly this Grievance is hereby **DENIED.**

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

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated December 15, 1998