JAMES DYER,

Grievant,

v.

DOCKET NO. 97-50-510

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James Dyer, filed the following grievance in late August or early September, 1997:

> Grievant is regularly employed as a Bus Operator. Grievant's extracurricular assignment was terminated in violation of West Virginia Code §§18A-2-7, 18A-4-16, and county policy. Grievant requests reinstatement to his extracurricular assignment with retroactive back pay with interest.

Following adverse decisions at the lower levels, Grievant appealed to level four on November 19, 1997. A hearing was conducted on January 14, 1998, and this case became mature for decision on February 3, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

STATEMENT OF EVIDENCE

LII Grievant's Exhibits

Exs. A-B -

Grievance documents.

Ex. C -

August 25, 1997 memorandum from King Queen, Director of Transportation, to Pete Dyer.

Ex. D -

October 9, 1997 letter from Kimberly S. Ray To Whom It May Concern.

LII Respondent's Exhibits

Ex. 1 -

June 23, 1997 Agreement between Wayne County Board of Education and West Virginia Education Support Personnel, West Virginia Education Association, and West Virginia School Service Personnel Association.

Ex. 2 -

Contract of Employment for Extracurricular Assignment of James Dyer.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Wayne County Board of Education ("Board") as a Bus Operator.

2. Grievant and the Board entered into a contract of employment for extracurricular assignment on March 30, 1995, which provides, among other things, that the Board is permitted to terminate the extracurricular assignment and the compensation that comes with it, with ten days written notice, if "the need for the services to be provided by this extracurricular assignment no longer exists . . .", or "the funding for the position is no longer available." R. Ex. 2.

3. Grievant's extracurricular assignment is as follows: Takes Pre-School Special Education students from the Wayne area to the Thompson Center and returns from the Thompson Center to the Wayne area. R. Ex. 2.

4. On or about August 25, 1997, the Board provided Grievant with ten days' notice that his extracurricular contract was being terminated due to lack of need. G. Ex. C.

5. The students Grievant transported in accordance with Finding of Fact No. 3 continued to need transportation. These students and students from two other extracurricular assignments were assigned to Wendall Chaffins as part of his regular busassignment. (Apparently, all need for the transportation of students from Mr. Chaffins' regular route during the 1996-97 school year unexpectedly disappeared over the summer of 1997).

6. Mr. Chaffins had difficulty making the newly combined regular route described above, and the portion of his run that constituted Grievant's extracurricular assignment was “spun out” of Mr. Chaffins' regular route and reestablished as a “free standing” extracurricular assignment on or about November 1, 1997.

7. The “free standing” extracurricular run was not posted or reassigned to Grievant, but was instead assigned to Gary Porter, a regular Bus Operator.

DISCUSSION

It is well settled that the procedural requirements of W. Va. Code § 18A-2-7, i.e., notice and an opportunity to be heard, must be complied with in order for a county board of education to terminate an extracurricular contract. Smith v. Bd. of Educ., 341 S.E.2d 685 (W. Va. 1985); Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996). However, the contract itself may specify other terms and conditions under which it may be terminated. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

In this case, Grievant argues that neither of the conditions present in his extracurricular contract of employment were present when his contract was terminated by the Board. Clearly, there is no argument that there was a lack of funding for the extracurricular bus run. The case turns on whether there was a “need” for the extracurricular contract. Grievant argues that, because the run is still being performed, firstby Mr. Chaffins as part of his regular run, and later by Mr. Porter as an extracurricular assignment, there is still a need for the run.

Because the Board could condense three extracurricular assignments into one regular bus run in the Fall of 1997, it argues that it no longer “needed” the extracurricular bus run driven by Grievant, and thus, he was properly terminated under the terms of the contract.

The outcome of this grievance hinges on the wording of the contract, which contains the following pertinent terms and conditions:

> 1. This is not a continuing contract nor is it a yearly renewable contract. It is an assignment of indefinite duration which is based solely upon the anticipated needs of the Wayne County School System for a bus operator to transport students to and from multilocations for curricular or educational purposes, other than the regular runs required of a bus operator in the pickup and delivery of students to and from school.
>
> 2. The Employee specifically agrees that the Board may terminate this assignment at any time upon ten (10) days written notice in the event (1) that the need for the services to be provided by this extracurricular assignment no longer exists, in the

> opinion of both the Director of Transportation and the County Superintendent of Schools, or (2) that the funding for this position is no longer available. The Employee may give up this assignment upon five (5) days written notice to the Director of Transportation.

R. Ex. 2.

It is clear from the evidence presented in this case that the "need for the services to be provided by this extracurricular assignment" continued to exist at the time Grievant's contract was terminated, and continued to exist at least up until the date of the level four hearing. Indeed, by the time this case reached level four, it had been determined by the Board that Mr. Chaffins could no longer make his regular run with the three consolidated extracurricular runs, and had "spun out" that portion of his run that had been Grievant'sextracurricular assignment. Even then, the Board filled the assignment with yet another bus operator, rather than returning the assignment to Grievant.

The Board puts forth many arguments about the feasibility of Grievant's ability to deliver the students on the extracurricular run to school on time, and many other explanations for why it terminated the extracurricular contract. However, none of those reasons was expressed to Grievant in his termination letter. The only explanation given to Grievant was that there was a "lack of need." No doubt it came as a surprise to Grievant when two fellow bus operators continued to make the extracurricular run that had just been terminated for "lack of need."

I do not find the Board's explanations convincing. If the Board is concerned about rerouting bus schedules in the Fall, it must follow the same statutory requirements as every other board of education, and put potentially affected bus operators on notice in the Spring that their extracurricular runs may be terminated. This Grievance Board has upheld the termination of an extracurricular contract when there truly was no "need" for the contract, in Ramey, supra. However, in Ramey, there truly was no need for the bus run as the student who made up the entire extracurricular bus run was no longer riding the bus. It would have been absurd to hold that the Board had to continue paying Ms. Ramey for an extracurricular bus run that she did not even make. Further, the contract specifically stated that the terms of the extracurricular bus run were conditioned upon the student's IEP, and in that case, the IEP changed to the extent the student no longer rode the bus.

CONCLUSIONS OF LAW

1. The procedural requirements of W. Va. Code § 18A-2-7, i.e., notice and an opportunity to be

heard, must be complied with in order for a county board of education toterminate an extracurricular contract. Smith v. Bd. of Educ., 341 S.E.2d 685 (W. Va. 1985); Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996).

2. The contract itself may specify other terms and conditions under which it may be terminated. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

3. Grievant has proven by a preponderance of the evidence that there was still a need for his extracurricular bus run, and the Board violated the terms of the contract when it terminated Grievant's extracurricular bus run in August 1997.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to reinstate Grievant's extracurricular bus run, and to compensate him for back pay in the amount he would have made had his contract not been terminated, plus interest.

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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: March 18, 1998