N. SUE BERRY,

Grievant,

v. **Docket No. 01-24-025**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, N. Sue Berry, employed by the Marion County Board of Education (MCBOE) as an Aide, filed a level one grievance on October 31, 2000, in which she alleged violations of W. Va. Code §§ 18A-4-8b and/or 18A-4-16 when a position was filled without posting. Grievant requests that the position be posted, and if she is the successful applicant, back pay, interest, and benefits. Grievant's immediate supervisor lacked authority to resolve the matter at level one, and following an evidentiary hearing, the grievance was denied at level two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and appealed to level four on January 30, 2001. Grievant, represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBOE, represented by Stephen R. Brooks, Esq., agreed that the matter could be submitted for decision based upon the lower-level record. The grievance became mature for decision on May 2, 2001, the final due date for proposed findings of fact and conclusions of law.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant is employed by MCBOE as an Aide IV, and has been assigned as a transportation aide in the special needs department at all times pertinent to this decision. 2. During the 2000-2001 school year, MCBOE employed twenty-one Aides for extended day duties. These employees worked from one-half, to two and one-half, additional hours per day.

3. Anita Cunningham is employed as a special needs Aide for preschool children at Blackshere Elementary School, including E.S. and W.R. (See footnote 1) Effective the 2000- 2001 school year, Ms. Cunningham agreed to a change in her daily work schedule to accompany the two special needs children while they were transported to and from school on a regular bus.

4. Ms. Cunningham was compensated for an additional two hours and thirty minutes for her extended day duties.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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.

Grievant argues that all school service personnel assignments are considered either regular, extracurricular, or extra duty. Because extra duty assignments are irregular or periodic and rotated on the basis of seniority, and the two and one-half hour extended duty assignment held by Ms. Cunningham is only slightly shorter in duration than the scheduleof the bus operator assigned to that run, it must be a regular position. In the alternative, Grievant asserts that the assignment would be extracurricular, although it would be the longest of such assignments. In either case, Grievant argues that MCBOE was required to post the assignment pursuant to W. Va. Code §18A-4-8b or § 18A-4-16. Finally, Grievant relies upon Zirkle, et al. v. Hancock County Board of Education, Docket No. 95-15-585A (July 18, 1996), in support of her claim that the addition of a significant amount of work time to a position that results in a significant pay increase transforms the position and requires posting.

MCBOE administrators Robert VanGilder and Dennis Edge testified at level two that a number of options were considered when determining how the children would be transported. Assignment of a single, special needs bus was found to be cost prohibitive. Consideration of the amount of time all the children would be on the bus was also a controlling factor. MCBOE asserts that assigning Ms. Cunningham to assist the children while on the bus met all legal and physical needs of the children, and was fiscally sound. MCBOE denies that the decision to offer Ms. Cunningham an extended schedule created a new position since she was merely completing an extension of the services she was already providing as an Aide, and no additional contract had been issued, as it had in Zirkle. MCBOE concludes that the decision was properly made within the reasonably exercised discretion of the administrators.

Although the addition to Ms. Cunningham's schedule is unusually long, Grievant has failed to prove that two and one-half hours constitute a regular position which required posting pursuant to W.

Va. Code § 18A-4-8b. While the Aide is on the bus nearly as long as the driver, bus operators are responsible for pre-trip and post-trip activities which extendtheir day considerably beyond the time they are actually driving. Grievant did not offer evidence of the total hours the bus operator actually does work, nor did she prove that any other employee with a regular assignment worked for such a short period of time.

W. Va. Code § 18A-4-16 defines extracurricular assignments as "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," and provides that "all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article." Extracurricular assignments must be filled "in accordance with section eight-b of this article," unless an alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within the classification category of employment.

Because the extended work schedule was clearly not a part of the Aides' regularly scheduled work hours, and can be readily distinguished from their instructional responsibilities, it is determined that MCBOE created extracurricular positions as defined by W. Va. Code § 18-4-16. (See footnote 2) Absent any evidence that an alternative method for filling the assignments had been approved by MCBOE and the Aides; they must be posted and filled pursuant to W. Va. Code § 18A-4-8b. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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. W. Va. Code § 18A-4-16 defines extracurricular assignments as "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," and provides that "all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article."

3. Extracurricular assignments must be filled pursuant to W. Va. Code § 18A-4- 8b unless an alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within the affected classification category of employment. 4. Grievant has proven by a preponderance of the evidence that the extended day assignments held by a number of Aides are extracurricular in nature and must be filled pursuant to W. Va. Code § 18A-4-8b.

Accordingly, the grievance is **GRANTED**, and MCBOE Ordered to fill any such future assignments consistent with this decision. Grievant's request that the position[s] now be posted is impractical as the end of the school year is imminent and the entire process would be speculative in nature. Absent any evidence that she would be more entitled to the position than Ms. Cunningham; no additional relief is available to Grievant at this time.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 21, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Consistent with Grievance Board practice, students will be identified only by their initials.

Footnote: 2

Although Grievant challenged only the extended schedule of Ms. Cunningham, this decision would apply to all extended schedules.