CHARLENE CREAKMAN,

Grievant,

v. **DOCKET NO. 03-23-095**

LOGAN COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

In a grievance filed January 29, 2003, Grievant Charlene Creakman stated: "Extra- curricular run (pre-K, Logan to Verdunville). Grievant states there are two (2) separate contracts (1 regular and 1 extra curricular). The extra curricular runs are posted and awarded to the most senior, full time employee that can work into their schedule the time to perform these extra runs." Grievant's stated relief requested is: "Grievant wants re- instated to the run and back pay for all days she would have been performing the run."

After being denied at the lower levels, a level four hearing was held May 9, 2003, at the Grievance Board's Charleston Office. Grievant was represented by co-worker Diana Adams, and Respondent was represented by its counsel, Leslie Tyree, Esq. (See footnote 1) The matter became mature for decision at the close of the hearing.

I find the following material facts, which are not disputed, have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant has been regularly employed by Logan County Board of Education (Respondent) since 1985 as a Bus Operator.

2. Another Bus Operator, Diana Adams, was off work for an extended period of time (the exact dates of which are not in evidence) and a substitute was called in to cover her runs.

3. In addition to her regular morning and evening runs, Ms. Adams had an extracurricular

contract for a preschool run from Logan Elementary to Verdunville Elementary, for which she received $20 per day as needed.

4. Ms. Adam's extracurricular run was temporarily assigned to Grievant, as she was the most senior regular bus operator whose schedule would permit her to cover the run.

5. After driving the extracurricular run for two days, Grievant was removed from the run and it was given instead to the substitute driver who was covering Ms. Adams' regular run. Bus Supervisor Berel Scarberry believed that change to be a result of a grievance filed by the substitute.

6. In the past, coverage for extracurricular runs was generally accommodated in three different ways:

> A. If the regular driver was able to make her regular morning and evening runs, but needed to miss her extra run, she would simply ask another driver to cover it for her, and let the supervisor know who to pay for it.
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> B. If the regular driver was on an approved medical leave of absence, both the driver's regular and extracurricular runs were posted as long-term temporary jobs, to be bid on separately by the other drivers.
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> C. If the regular driver were off for a short or extended period of time without a leave of absence, such as for sickness or workers' compensation disability, both regular and extra runs were assigned to one substitute driver.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. The facts are not in dispute, but the parties differ on how the applicable laws should be applied to the facts. Grievant argues that W. Va. Code §§ 18A-4-15 and 18A-4-16 require Respondent to assign temporary coverage of extracurricular runs to regular bus operators, in order of seniority and availability. She argues that, because there are two different contracts, one for a driver's regular run and one for a driver's extra run, there are two different position vacancies when that driver is absent. She argues that she was entitled to the Logan-Verdunville run for the entire duration of Ms. Adams' absence, as evidenced by her original assignment to do so. Respondent's position is that when a regular driver has a substitute cover her run, that substitute covers the entire run, including any extra runs the absent driver may have had.

West Virginia Code § 18A-4-15 treats employment of service personnel substitutes. That section

states in part:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service employee;
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> (2) To fill the position of a regular service employee who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board: *Provided,* That if the leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee statusto a person hired to fill the position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b of this article. The substitute shall hold the position and regular employee status only until the regular employee returns to the position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to the position: *Provided, however,* That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided in this section, upon termination of the leave of absence the employee shall be returned to his or her original position: *Provided further,* That no service person may be required to request or to take a leave of absence: *And provided further*, That no service person shall be deprived of any right or privilege of regular employment status for refusal to request or failure to take a leave of absence;
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> (3) To perform the service of a service employee who is authorized to be absent from duties without loss of pay;
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> . . .
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> (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: *Provided,* That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.
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> . . .

Although the extra run in question is characterized by the title on Ms. Adams' contract for that run as an "extra-duty assignment," it is actually an extracurricular assignment. W. Va. Code § 18A-4-8b defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." The Contract, however, states explicitly that"This agreement is entered into pursuant to the West Virginia Code [§] 18A-4-16." Level four Grievant's Exhibit No. 3. The other section cited by Grievant, W. Va. Code § 18A-4- 16, defines extracurricular assignments as:

> [A]ny 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: *Provided,* 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 of this article, or extra-duty assignments, as provided by section eight-b of this article.

The Logan-Verdunville run was a regularly-scheduled mid-day run that occurred at times other than Ms. Adams' regularly-scheduled morning and evening working hours.

W. Va. Code § 18A-4-16(4) also states, "[a]n 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." The crux of Grievant's argument depends on the interplay and interpretation of that section with W. Va. Code 18A-4-15(b), particularly the proviso, "That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence."

Whether a driver's regular and extracurricular assignments are separate assignments is easily settled. As the saying goes, if it looks like a duck, walks like a duck and quacks like a duck, it *most probably is a duck*. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001); Dawson

v. McDowell County Bd. of Educ., Docket No. 97-33-010 (May 29, 1998); Loudermilk v. Loudermilk, 183 W. Va. 616, 397 S.E.2d 905 (1990). The positions bear all the traits of separate and distinct assignments. A Bus Operator's regular and extracurricular assignments are posted separately, have separate contracts, and different working times. Each is a unique position, therefore, there are two different vacancies created when a regular Bus Operator with an extracurricular run misses work on a given day.

However, this Grievance Board has consistently held that the provisions of W. Va. Code 18A-4-15(b) do not apply to Bus Operators, because they do not share a common work location. The Grievance Board adheres to the doctrine of *stare decisis* (See footnote 2) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). Prior cases based on similar facts held that “because [Bus Operators] do not share a common working station with other Bus Operators they are not entitled, under W. Va. Code §18A-4-15, to 'step up,' or assume any part of an ongoing assignment held by an absent, regularly-employed bus operator. Miller v. Monongalia County Bd. of Educ., Docket No. 99-30-223 (Sep. 29, 1999). Therefore, “[R]egularly employed bus operators have no 'right' to substitute for an absent driver or to drive anypart of the ongoing driving assignments or routes of absent regularly-employed bus operators.” Miller, *supra*; Costello v. Monongalia County Bd. of Educ., Docket No. 98-33- 388 (Jan. 22, 1999); Messer v. Mingo County Bd. of Educ., Docket No. 96-29-513 (July 31, 1997) ; Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993); Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992).

Despite the fact that Ms. Adams' extracurricular position was separate from her regular position, Respondent did not err in denying Grievant, a regularly-employed Bus Operator, the opportunity to substitute in that position.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable

person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. "[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the positionof an absent employee shall be given the opportunity to hold that position throughout the absence." W. Va. Code 18A-4-15(b).

3. The "Duck Test" states, "If it looks like a duck, walks like a duck and quacks like a duck, it *most probably is a duck*." Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001); Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-010 (May 29, 1998); Loudermilk v. Loudermilk, 183 W. Va. 616, 397 S.E.2d 905 (1990).

4. A service employee's regular and extracurricular assignments are separate positions for purposes of assigning service personnel substitutes in that employee's absence.

5. "Because [Bus Operators] do not share a common working station with other Bus Operators they are not entitled, under W. Va. Code §18A-4-15, to "step up", or assume any part of an ongoing assignment held by an absent, regularly-employed bus operator." Miller v. Monongalia County Bd. of Educ., Docket No. 99-30-223 (Sep. 29, 1999)

6. Regularly employed bus operators have no "right" to substitute for an absent driver or to drive any part of the ongoing driving assignments or routes of absent regularly- employed bus operators. Miller, *supra*; Costello v. Monongalia County Bd. of Educ., Docket No. 98-33-388 (Jan. 22, 1999); Messer v. Mingo County Bd. of Educ., Docket No. 96-29- 513 (July 31, 1997) ; Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993); Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992).

7. The Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023,207 S.E.2d 169 (1974). This adherence to consistently applying principles of law to cases where the facts are substantially the same is founded upon a determination that the employees and employers whose relationships are regulated by this

agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Prior decisions of the Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995); Miller, *supra*.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: May 20, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Ms. Tyree was also the Grievance Evaluator at level two.

Footnote: 2

Latin for "to abide by" or "to adhere to" decided cases.