DENNIS GARNER,

Grievant,

v. **Docket No. 02-30-352**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and,

JEANNE STRADER,

Intervenor.

D E C I S I O N

Grievant, Dennis Garner, employed by the Monongalia County Board of Education (MCBE) as a bus operator, filed a level one grievance on September 20, 2002, in which he alleged violations of W. Va. Code §§ 18A-4-8b and 18A-4-16 when he was not reassigned to an extracurricular position. For relief, Grievant requested back pay with interest. School Bus Supervisor Paul Christopher notified Grievant that the matter could not be resolved at level one. Following a hearing, the grievance was denied at level two, and Grievant elected to bypass level three, as is permitted by W. Va. Code § 18-29-4(c). Appeal was made to level four on October 30, 2002, and an evidentiary hearing conducted on January 7, 2003. Grievant was represented by John E. Roush, Esq., of WVSSPA, MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney, and Intervenor appeared *pro se.* The grievance became mature for decision on February 11, 2003, the due date for submission of proposed findings of fact and conclusions of law.

The following findings of fact are derived from a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by MCBE as a bus operator for approximately fifteen years. 2. MCBE employed twelve bus operators under extracurricular contracts for the Kaleidoscope program during the 2001-2002 school year. Grievant was initially awarded the assignment transporting students four days a week from Cheat Lake Middle School in February 2002, after Intervenor, Jeanne Strader, received a more lucrative assignment.

3. Superintendent Dr. Michael J. Vetere, Jr. notified Grievant by letter dated March 1, 2002, that he would recommend the termination of the extracurricular assignment effective June 30, 2002, as part of a reduction in force. The reason given for the action was “lack of need.”

4. On April 16, 2002, MCBE conducted a hearing on the proposed termination pursuant to Grievant's request. MCBE subsequently voted to accept the recommendation that Grievant's extracurricular assignment be eliminated.

5. After MCBE assessed the needs for the Kaleidoscope program for the 2002- 2003 school year, nine extracurricular runs were collectively posted.

6. The extracurricular assignments were awarded to the most senior operators who had held those positions the prior year. Intervenor, a bus operator with eighteen years of seniority, was awarded the Cheat Lake Middle School run previously held by Grievant.

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. Grievant argues that he is entitled to retain the extracurricular position under the provisions of W. Va. Code §18A-4-16(6) and W. Va. Code § 18A-4-8b. MCBE argues that W. Va. Code § 18A-4-16(6), as amended effective July 1, 2001, is not applicable in this situation, and that Grievant's extracurricular assignment was properly eliminated under the reduction in force provisions of W. Va. Code § 18A-4-8b.

W. Va. Code §18A-4-16(6) provides:

An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant

to section eight-b of this article.

This statute is not controlling in the present matter not only because it was not effective at the time of the reduction in force, but also because Grievant's extracurricular assignment did not continue to exist. Although the Cheat Lake run continued during the 2002-2003 school year, three fewer assignments existed than in the previous year. Therefore, the ruling in this grievance is controlled by Wood County Board of Education v. Smith, 202 W. Va. 117, 502 S.E.2d 214 (1998), in which the West Virginia Supreme Court of Appeals held the elimination of extracurricular bus operator positions constituted a reduction in force.

Grievant's argument that the amended W. Va. Code § 18A-4-16 (6) eliminates any precedential value of prior cases, is simply not supported by the statutory language. Certainly, a service employee who holds an extracurricular assignment may retain it the following year if it continues to exist. In this case, three Kaleidoscope runs were eliminated, and no longer continue to exist. MCBE properly followed the provisions of W. Va. Code § 18A-4-8b when it released the least senior bus operators from their extracurricular runs to provide positions for the more senior bus operators. (See footnote 1)

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 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 must follow the reduction in force procedures of W. Va. Code § 18A-4-8b when eliminating extracurricular service personnel assignments. Wood County Bd. of Educ. v. Smith, 202 W. Va. 117, 502 S.E.2d 214 (1998), citing Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994). 3. MCBE acted properly when it terminated the extracurricular contracts of the three least senior bus operators when three Kaleidoscope assignments were eliminated.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: MARCH 28, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The portion of W. Va. Code § 18A-4-8b relied upon by Grievant states, "the county board may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter." This provision does not apply to the facts in this matter since Grievant did not hold the extracurricular position assignment on the effective date of the section.