KAREN YEAGER,
Grievant,

v. **Docket No. 03-20-388**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent,

D E C I S I O N

Grievant Karen Yeager is employed as a bus operator at the East Bank Bus Terminal by the Kanawha County Board of Education ("KCBOE"). Her Statement of Grievance alleges:

> Violation of WV Code 18A-4-16 in assignment of extracurricular runs. Grievant's run was eliminated which allowed a less senior driver to keep her run.
>
> Relief sought: To receive the 21st Century run at Sharon Dawes with back pay, 10% interest and any and all benefits

The grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on December 22, 2003, and a Level IV hearing was held on February 2, 2004. This case became mature for decision on February 25, 2004, after receipt of the Grievant's proposed findings of fact and conclusions of law.[1]

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a bus operator and works out of the East Bank Bus Terminal.

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[1]Grievant was represented by Anita Mitter, from the West Virginia Education Association, and Respondent was represented by KCBOE's General Counsel, James Withrow.

2. Approximately four years ago, KCBOE received federal funding for an after school program called the 21st Century Program.

3. Extracurricular bus runs were needed for this program, and these positions were posted, but Grievant did not apply. At that time, there were four runs out of the East Bank Bus Terminal, two to Sharon Dawes and two to Malden.

4. Later, the bus operator who had one of the Malden runs retired, his run was posted, and Grievant applied and received the position. Because Grievant had another job on Mondays at Bob Evans, she asked to split the run with the next most senior applicant. KCBOE granted this request.

5. Subsequently, one of the Sharon Dawes runs was reposted, but Grievant did not apply because she already had the Malden run.

6. The federal funding ceased after three years, the 2002 - 2003 school year, but KCBOE decided to keep a portion of the program going for at least another year with the remaining federal funds. There was a need for only one Malden run, and Grievant's run was cut because she was the least senior bus operator on a Malden run. Grievant was notified of this lack of need in September 2003, after the start of the school year.

7. The bus operator with whom Grievant shared the extracurricular assignment did not file a grievance.

8. Another bus operator, who is less senior than Grievant, still has a Sharon Dawes run, and Grievant wishes to remove this bus operator and have this run given to her.

9. Grievant does not finish her regular afternoon run until 4:45 p.m. To be able to take the Sharon Dawes run, she must be at the school at 5:00 p.m.

10. Grievant testified she could be at Sharon Dawes at 5:00 p.m. Test. Grievant, Level IV Hearing.

Issues and Arguments

Grievant asserted at the lower levels that she did not receive proper notice of the termination of her extracurricular run, but this was not in her appeal to Level IV, nor discussed at the Level IV hearing. However, it was argued in Grievant's proposals. Grievant also averred that because she is more senior than the bus operator who currently holds the Sharon Dawes run, the run should be assigned to her. Additionally, Grievant maintained KCBOE's assertion she could not be at the school in time is incorrect.

KCBOE did not speak to Grievant's notice argument, asserted Grievant cannot be at the school in time to begin the run, and since the positions were posted as site specific, the Sharon Dawes run cannot be granted to a person who held a Malden run.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. "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 employer has not met its burden. Id.

I. Type of run

One issue to address initially is whether the runs at issue were extracurricular assignments or extra duty assignments.[2] Extracurricular assignment are defined as, "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(1). W. Va. Code § 18A-4-8b(f) 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." As this run was four days a week at the same time each day and for the purpose of providing support services to students who attended an after school program, this bus run was clearly an extracurricular assignment.

II. Grievant's entitlement to the less senior bus operator's extracurricular assignment

W. Va. Code § 18A-4-16 discusses extracurricular assignments and states:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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: 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.

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[2]Grievant argued it was an extracurricular assignment at Level II, but stated it was an extra-duty run in her Level IV proposals.

(2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.

(3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

(4) An 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.

(5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

(6) <u>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.</u>

(Emphasis added).

This <u>Code</u> Section, at subsection (6), answers many of the questions raised by Grievant. The extracurricular assignment is not open to Grievant. An extracurricular assignment from a prior school year belongs to the employee who was employed in extracurricular assignment "during the previous school year," and that employee "shall have the option of retaining the assignment if it continues to exist in any succeeding school

year." Clearly, the employee chose to retain her position, and thus, it cannot be given to Grievant.

III. Notice

W. Va. Code § 18A-2-7 requires that "an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer. . . . Any teacher or employee who desires to protest such a proposed transfer may request in writing a statement of the reason for the proposed transfer [and]. . . . [w]ithin ten days of the receipt of the statement of the reasons, the teacher or employee may make a written demand upon the superintendent for a hearing. . . ."[3]

In Smith v. Board of Education, 176 W. Va. 65, __, 341 S.E.2d 685, 690 (1985), the West Virginia Supreme Court held that contracts entered into pursuant to W. Va. Code §18A-4-16 were not exempt from procedural requirements of notice and hearing. The Court stated that "[n]o part of W. Va. Code §18A-4-16 indicated the legislature intended to exempt extracurricular activities from the protections generally attached to all other school personnel positions." Smith at 688. See Hixenbaugh v. Monogalia County Bd. of Educ., Docket No. 99-30-539 (Apr. 24, 2000); Doss v. Mingo County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996). See also Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994); Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

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[3]Refusal to renew an extracurricular contract is considered a transfer. Smith v. Bd. of Educ., 176 W. Va. 65, __, 341 S.E.2d 685, 690 (1985).

Since there was no contract or posting admitted into evidence, there was no evidence to indicate Grievant's extracurricular assignment was for the prior school year only. Without such evidence, the statute would indicate Grievant was entitled to notice which she did not receive, and Grievant should receive payment for the extracurricular assignment. Hixenbaugh, supra; Doss, supra.

One other issue remains. During the 2002 - 2003 school year, Grievant drove this extracurricular assignment only two days a week, half of the required time, because she had another position at Bob Evans. Grievant still has a position with Bob Evans, but stated at hearing that this year she was planning not to work during the week, and she planned to take the run the full, four days. Grievant never worked this run during the 2003 - 2004 school year, and she did not submit any documentation that she had given to KCBOE to reflect her desire to change the process from the year before. Additionally, there was no evidence from the other bus operator, with whom she shared the position, to indicate she agreed to this change and her removal from the run. W. Va. Code § 18A-4-16(6) indicates this employee would "have the option of retaining the assignment if it continues to exist. . . ." Accordingly, without any evidence to demonstrate the other bus operator gave up her right to the position, it would create a windfall to pay Grievant for the entire extracurricular assignment.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. "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 employer has not met its burden. Id.

2. An extracurricular assignment from a prior school year belongs to the employee who was employed in the extracurricular assignment "during the previous school year" and that employee "shall have the option of retaining the assignment if it continues to exist in any succeeding school year." W. Va. Code § 18A-4-16.

3. W. Va. Code § 18A-2-7 requires that "an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer. . . . Any teacher or employee who desires to protest such a proposed transfer may request in writing a statement of the reason for the proposed transfer [and]. . . . [w]ithin ten days of the receipt of the statement of the reasons, the teacher or employee may make a written demand upon the superintendent for a hearing. . . ."

4. Contracts entered into pursuant to W. Va. Code §18A-4-16 are not exempt from procedural requirements of notice and hearing. Smith v. Bd. of Educ.,176 W. Va. 65, __, 341 S.E.2d 685, 690 (1985). "No part of W. Va. Code §18A-4-16 indicated the legislature intended to exempt extracurricular activities from the protections generally attached to all other school personnel positions." Smith at 688. See Hixenbaugh v.

Monogalia County Bd. of Educ., Docket No. 99-30-539 (Apr. 24, 2000); Doss v. Mingo County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996). See also Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994); Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

5. Grievant did not receive timely notice that her extracurricular assignment was eliminated.

6. Because Grievant shared the run with another bus operator, and this bus operator was also entitled to continue in the run pursuant to W. Va. Code § 18A-4-16(6), Grievant cannot be compensated for the entire extracurricular assignment.

Accordingly, this grievance is **GRANTED**, and KCBOE is **ORDERED** to pay Grievant back pay and benefits, plus interest at the statutory rate, for one-half of the extracurricular bus run, retroactive to September 3, 2003.

Any party may appeal this decision to the Circuit Court of Kanawha 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS
ADMINISTRATIVE LAW JUDGE
Dated: April 6, 2004