GERALD MARSHALL,

Grievant,

v. Docket No. 05-30-341

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Gerald Marshall ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on August 8, 2005, in which he alleged, "I was pulled from the grass crew and I feel that I should of been able to stay do [sic] to a schedule change that allows me to do both jobs." For relief, Grievant requested to return to work, and lost wages. The grievance was denied at level one, but was granted following an evidentiary hearing at level two. MCBE appealed the level two decision to level four on September 28, 2005. Grievant, represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE counsel Jason S. Long, of Kay Casto & Chaney, PLLC, agreed to submit the grievance for decision based upon the record developed at level two. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by the parties on or before December 8, 2005.

The following facts are derived from a preponderance of the evidence made part of the level two record.

Findings of Fact

1. Grievant has been regularly employed by MCBE as a bus operator at all times pertinent to this grievance. 2. In April 2005, Grievant applied for, and received, a position on the summer grass cutting crew. This position was to continue through October 16, 2005. Although it had previously been a 40-hour per week job, the crew was reduced to 18-20 hours a week, and Grievant completed this assignment on the weekends.

3. Grievant also applied for, and received, a 40-hour per week position on the summer carpet crew, effective June 17, 2005.

4. MCBE required Grievant to relinquish one or the other of the summer positions.

Grievant retained the carpet crew assignment, and proceeded with this grievance.

Discussion

The level two hearing evaluator granted the relief requested by Grievant after determining that the summer positions are not regular positions, but extra duty/curricular in nature, and that MCBE does not prohibit service employees from holding more than one extra duty/curricular position if there is no scheduling conflict. MCBE appeals that decision as provided by W. Va. Code §18-29-3(t), which states:

Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§18-29-4] of this article and provided both parties in section seven [§18-29-7] of this article.

Thus, MCBE bears the burden of proof in this case. See Winnell v. Kanawha County Bd. of Educ., Docket No. 02-20-240 (Oct. 28, 2002); Jackson v. Grant County Bd.of Educ., Docket No. 97-12-224 (Oct. 16, 1997); Harmon v. Fayette County Bd of Educ., Docket No. 96-10-500 (Aug. 25, 1997).

MCBE argues that the level two decision is clearly wrong because the summer positions in question were not extracurricular assignments as defined by W. Va. Code § 18A-4-16, or extra-duty assignments under W. Va. Code § 18A-4-8b, and that a service employee may not hold more than one regular position as stated in W. Va. Code § 18A-4- 8h. Grievant asserts he is entitled to both positions as it is well-established that an employee may hold more than one extracurricular assignment, and the same should hold true of summer assignments since both are excluded from the limitations contained in W. Va. Code § 18A-4-8h.

W. Va. Code § 18A-4-16 defines extracurricular duties to "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.

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." Grievant's assignment to the carpet crew is for forty hours per week, and is clearly a regular, summer position. The grass crew assignment could have been posted as an extracurricular position; however, MCBE elected to post it as a regular position, albeit a half-time position. The posting for this position was not made part of the record, but reference is made to the fact that it was advertised as a forty-hour per week position, but that it was subsequently reduced, apparently for lack of need. In any event, the decisionto post the grass crew position as a regular, rather than extracurricular assignment, was within the discretion of MCBE, and was not shown to be arbitrary and capricious.

W. Va. Code § 18A-4-8h limits the number of school service personnel positions to be held by an employee, stating, "no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time . . . ." Because the carpet crew was a regular, full-time assignment, and the grass crew was a regular, half-time position, Grievant was not entitled to keep both jobs. Therefore, MCBE has proven that the level two decision was clearly wrong. The foregoing findings of fact and discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. A board of education may appeal a level two decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. W. Va. Code §18-29-3(t).

2. When a county board of education appeals the level two grievance evaluator's decision, the county board of education has the burden of proof. See Winnell v. KanawhaCounty Bd. of Educ., Docket No. 02-20-240 (Oct. 28, 2002); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997); Harmon v. Fayette County Bd. of Educ.,

Docket No. 96-10-500 (Aug. 25, 1997). 3. Respondent met its burden of proof by demonstrating the decision of thegrievance evaluator to be clearly wrong. Accordingly, the level two decision is reversed to the extent that Grievant was awarded lost wages, and the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or Monongalia 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.

DATE: JANUARY 20, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE