THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ILLA POWROZNIK-HESS,

Grievant,

v.

DOCKET NO. 07-30-107

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent, and,

RHONDA OWENS,

Intervenor.

DECISION

This grievance was filed on October 5, 2006, by Grievant, Illa Powroznik-Hess. Her statement of grievance reads:

> I applied for position #2006-535. I should have been awarded the position since I held it during the 05-06 school year and because I was the most senior applicant from the Morgantown center. This is a violation of WV Code § 18A-4-8b.

The relief sought by Grievant "is to be awarded the position with all back pay, interest and benefits which are due to me."

Grievant's supervisor denied the grievance, and Grievant appealed to level two. After a level two hearing was held on March 9, 2007, the grievance was denied at that level of the grievance procedure. Grievant waived level three, appealing to level four on March 26, 2007. A level four hearing was held before the undersigned on December 3, 2007, in the Grievance Board's Westover office. Grievant was represented by Ben Barkey, West Virginia Education Association, Respondent was represented by Jason S. Long, Esquire,Dinsmore & Shohl, and Intervenor was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association. This matter became mature for decision on January 18, 2008, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued she should have been awarded the extracurricular assignment at issue here, rather than Intervenor, Rhonda Owens, even though Ms. Owens was more senior than she. Grievant believed that an alternative procedure had been approved by the bus operators in the county in 1995, under which extracurricular runs were awarded according to seniority in the bus garage where the route originates. Grievant is the most senior bus operator in the Morgantown garage, and this assignment originated out of the Morgantown garage. Respondent and Intervenor argued that even if it is accepted that the bus operators did approve an alternative procedure, the board of education did not give its approval, which is required before an alternative procedure is effective. Grievant did not demonstrate that MBOE had approved an alternative procedure for filling extracurricular assignments which would allow these assignments to be assigned by seniority in a particular garage. Absent a board of education approved alternative procedure, such assignments must be made on the basis of qualifications, evaluations, and seniority in the county. *W. Va. Code §* 18A-4-16. The Intervenor had more seniority than Grievant, and was entitled to the assignment.

Grievant further argued she was entitled to continue in this extracurricular assignment because she had held the assignment during the preceding school year as a permanent substitute. Respondent pointed out that the posting for the permanentsubstitute position stated that it was for the 2005-2006 school year only. Grievant could serve in the position under that posting only for that

school year.

Finally, Grievant argued she should have been allowed to keep a Jobs Program run which was tacked on to the extracurricular run during the 2005-2006 school year. Grievant was assigned this run, but it was never posted as a separate run, and she was not entitled to keep the run.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a bus operator for 29 years.

2. Bus operators in Monongalia County are assigned to one of two bus garages, either the Morgantown garage, or the Blacksville garage, based upon the location of their regular bus routes. Grievant is the most senior bus operator assigned to the Morgantown bus garage. She is not the most senior bus operator in the county.

3. Intervenor Rhonda Owens has been employed by MBOE for 32 years. She is assigned to the Blacksville garage. Ms. Owens is the most senior bus operator in Monongalia County.

4. In August of 2006, MBOE posted an extracurricular bus run which would require the bus operator to transport students between Morgantown High School and the Monongalia Technical Education Center ("the MTEC run"). This run originated out of the Morgantown garage. Grievant and Ms. Owens bid on the extracurricular run. The run was awarded to Ms. Owens, based upon her seniority. 5. The extracurricular run at issue had previously been posted on October 20, 2005, as a permanent substitute position, from "11/16/05 through 6/9/06, or until incumbent returns whichever is first." Grievant bid upon and was awarded this position as a permanent substitute through the end of the 2005-2006 school year.

6. While Grievant was performing the MTEC run as a permanent substitute, a Jobs Program run was added to the MTEC run by the MBOE Director of Transportation. The Jobs Program run required Grievant to transport students from their job assignments to the Monongalia Technical Education Center four days a week. The exact route was changed every six weeks, as the students' job assignments changed. The Jobs Program run was not posted as a separate run during the 2005-2006 school year. It has been the practice of MBOE to assign these runs to bus operators who have

MTEC runs.

7. For a brief period during the 2006-2007 school year, Grievant continued to perform a Jobs Program run two days a week, and Intervenor performed the same Jobs Program run two days a week. At some point, Donna Sizemore, an MBOE bus operator with an MTEC run, was assigned this Jobs Program run, and this Jobs Program run was removed from Grievant. It is not clear from the record whether Intervenor continued to perform this Jobs Program run two days a week.

8. In August of 1995, the MBOE bus operators voted on whether they wanted to continue the practice of having certain types of runs assigned only to employees assigned to the bus garage closest to the location of the run. Most of the bus operators voted to continue this practice. No vote count was taken. MBOE did not take any action to approve this vote.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. (See footnote 1) "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. *Id*.

This grievance is about which of two employees should have received a posted extracurricular bus run. (See footnote 2) Should the most senior employee in the county have received the assignment, or should it have been awarded to a less senior employee in the county, whowas the most senior employee in the Morgantown garage? *W. Va. Code § 18A-4-16(5)* leaves no doubt that MBOE properly awarded this run to the most senior bus operator in the county, Ms. Owens. That *Code Section* provides as follows:

> The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment <u>may be utilized if</u> the alternative procedure <u>is approved both</u> <u>by the county board and by an affirmative vote of two thirds of the employees</u> within that classification category of employment. (Emphasis added.) (See footnote 3)

W. Va. Code § 18A-4-8b provides that school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service." (See footnote 4)

Grievant argued that the bus operators in Monongalia County had voted on and approved an alternative procedure, that extracurricular and extra-duty assignments would be made by seniority in the bus garage closest to the assignment. While there is no dispute that there was a vote taken relating to some alternative procedure, and it is likely that two thirds of the bus operators in the county approved an alternative procedure, there is a discrepancy in the testimony over what the bus operators approved. Grievant and the witnesses she presented from the Morgantown garage testified that the bus operators approved an alternative procedure for assigning both extra-duty and extracurricular runs, while Ms. Owens and the witness she presented from the Blacksville garage testified that the bus operators approved an alternative procedure only for assignment of extra-duty runs. No one recorded the vote in 1995. Further, no evidence was produced that MBOEhad ever approved an alternative procedure, as is required by the statute. An alternative procedure may only be utilized if it is approved by both the board of education and two thirds of the bus operators. *See Mullins v. Hancock County Bd. of Educ.,* Docket No. 07- 15-324 (Feb. 29, 2008).

Grievant held this same extracurricular run during the 2005-2006 school year, as a permanent substitute. She argued she should have been allowed to retain the extracurricular run after the end of the 2005-2006 school year, citing *W. Va. Code §* 18A-4- 16(6), regarding school service personnel being entitled to extracurricular assignments which continue to exist year after year. This provision is not applicable here. As stated in the posting, Grievant held the position as a permanent substitute, and only until the end of the 2005-2006 school year.

Finally, Grievant argued she should have been allowed to continue in her assigned "Jobs Program" run, as it was not a part of the extracurricular run at issue. (See footnote 5) Sometime after Grievant received the extracurricular run at issue as a permanent substitute (for the 2005-2006 school year), a Jobs Program run was added on to the extracurricular assignment. (See footnote 6) It has been the practice of MBOE to assign these runs to bus operators who have MTEC runs, and this run was not posted as a separate assignment. If the Jobs Program run was not part of the extracurricular run, Grievant was never properly awarded the run because it was not posted, and she has no statutory right to keep it. *See Adkins v. Lincoln County Bd. of Educ.,* Docket No. 07-22-272 (Aug. 25, 1997).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. Extracurricular school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service." *W. Va. Code §* 18A-4-8b. However, "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." *W. Va. Code §* 18A-4-16.

3. MBOE has not approved an alternative procedure for making extracurricular assignments. 4. MBOE did not err in selecting Intervenor for the extracurricular assignment at issue, as she was the most senior bus operator in the county.

5. As stated in the posting, Grievant held the extracurricular assignment at issue as a permanent substitute, only until the end of the 2005-2006 school year.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code §* 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: March 21, 2008

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

W. Va. Code §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis." The Grievance Board has found bus runs between a school and a vocational educational center to be part of a bus operator's regular run, rather than extracurricular, as these runs occur during the bus operator's regularly scheduled working hours, when the bus operator has a six hour work day. Garner v. Monongalia County Bd. of Educ., Docket No. (June 8, 2000). The parties did not dispute, however, that this run, which appears to occur during regularly scheduled working hours, was properly posted as an extracurricular run.

Footnote: 3

W. Va. Code § 18A-4-16 was amended in 1994 to add this paragraph.

Footnote: 4

The qualifications and evaluations of Grievant and Ms. Owens are not at issue in this grievance.

Footnote: 5

Grievant argued for the first time in her post-hearing written argument at level four that, by adding this Jobs Program run to the extracurricular run at issue after Ms. Owens was awarded the run, the extracurricular assignment at issue had changed, and the extracurricular assignment should be posted again. This late argument need not be considered by the undersigned, because Respondent and Intervenor were not on notice that they needed to address this issue. However, the case law is clear that a board of education may make changes to a bus operator's route, and, based upon the sparse evidence, the addition of this Jobs Program run, were it in fact considered to be a change, would not be so substantial a change that it would render the run at issue a different run which should be posted. Anderson, et al., v. Kanawha County Bd. of Educ., Docket No. 05-20-071 (July 19, 2005), aff'd Kanawha County Cir. Ct., Appeal No. 05-AA-114 (Feb. 15,

2006); Willett v. Mason County Bd. of Educ., Docket No. 95-26-468 (June 27, 1996).

Footnote: 6

Grievant was apparently allowed to share a Jobs Program run with Ms. Owens at the beginning of the 2006-2007 school year as a compromise.