THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AUDRA RENE´ STEPHENS,
Grievant,

v. **Docket No. 2009-0360-WayED**

WAYNE COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievant[1], Audra Rene´ Stephens, filed a grievance against her employer, Wayne County Board of Education, on September 16, 2008. The statement of grievance reads:

> Grievant's extracurricular assignment was terminated without notice required by W. VA. CODE 18A-2-7 while less senior bus operators retained their extracurricular assignments. Grievant alleges a violation of W. VA. CODE 18A-2-7, 18A-4-8b, & 18A-4-16.

For relief, Grievant seeks, "compensation for lost wages and restoration of an extracurricular assignment with the as,e [sic] or approximately the same hours as her previous assignment. (Grievant was offered another assignment after level I, but it conflicted with the duties of her second job.)"

A level three hearing was held on May 21, 2009, at the Grievance Board's Charleston office. Grievant was represented by John Roush, Esquire, WV School Service Personnel Association, and Respondent was represented by David Lycan, Esquire, Wayne County Schools. This case became mature on June 22, 2009, upon receipt of the parties' Findings of Fact and Conclusions of Law.

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[1]David Crisel, a bus operator, also had an extracurricular run involving Pre-K students at the Bison Center. His run was terminated without appropriate notice as well. Mr. Crisel filed a grievance, and at level I the two grievances were consolidated. After the level I grievance, Mr. Crisel accepted another extracurricular run position and dropped his grievance.

Synopsis

Grievant asserts her extracurricular assignment, which was performed from 7:30 am to 8:40 am and 1:00 pm to 1:30 pm was terminated without proper notice as required in W. VA. CODE §18A-2-7. Grievant was then offered an alternative extracurricular assignment to be performed from 10:30 am to 12:20 pm, but the time slot interfered with her private employment, and Grievant did not accept the position. Grievant argues this offer of an alternative assignment does not satisfy Respondent's obligation to Grievant for improperly terminating the assignment on which she bid.

Respondent argues that after level I, it was determined that it did not properly notify Grievant that her extracurricular assignment was being terminated. Pursuant to the level I decision, Respondent paid Grievant the money she would have earned until the alternative assignment became available. Respondent avers that when Grievant declined to accept the alternative position, it had met its obligation and stopped paying Grievant.

Respondent has met its obligations. This grievance is hereby DENIED.

Findings of Fact

1. Grievant is a regularly employed school bus operator.

2. Grievant's regular bus run for the 2007-2008 and 2008-2009 school years started with her morning run at 5:45 am and completed delivery of students at approximately 7:25 am. Grievant's afternoon run began at approximately 1:30 pm and completed delivery of students at approximately 4:15 pm.

3. During the 2007-2008 school year, Grievant had an extracurricular day run that she had been awarded approximately four years before.

4. This extracurricular run required Grievant to pick up and deliver special needs Pre-K students to the Bison Center and pick these students back up and take them to their residences.

5. The times for the extracurricular run were not on the posting. However, Grievant checked at the bus garage to determine the times of the run.

6. Grievant's extracurricular run to the Bison Center ran from 7:30 am to 8:40 am and 1:00 pm to 1:30 pm, and Grievant was paid $20 a day for the run.

7. At the beginning of the 2008-2009 school year, the Transportation Director was informed the day before school started that the scheduling for special needs Pre-K students would be changed.[2] The children would remain in two groups, but each group would attend school four days a week on the same days. The first group would attend from 8:00 am to 11:15 am, and the second group would attend from 11:15 am until 2:30 pm.

8. Because both of these times conflicted with Grievant's regular run, she was informed at the beginning of the 2008-2009 school year that her extracurricular assignment had to be terminated.

9. Respondent, however, continued to pay Grievant for the run, even though she was not making the run. Respondent did this to ensure the new schedule for the Pre-K students would be successful.

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[2]This change came about as a result of the state requiring more hours of education for preschool children.

10. Grievant filed a grievance on this issue. A level I decision found in favor of Grievant in that she was not timely notified of the termination of her extracurricular assignment during the 2007-2008 school year.

11. No back pay was awarded because Grievant had been continually receiving money for the terminated run.

12. Respondent was ordered to return Grievant to her extracurricular assignment of transporting Pre-K students to and from the Bison Center. If she could not be returned, then Respondent was ordered to continue to pay Grievant for the run. The Order went on to state that if Grievant refused to accept an extracurricular assignment transporting special needs Pre-K students to and from the Bison center or she accepted another extracurricular assignment during the day, Respondent would no longer have to pay Grievant for the terminated run.

13. The Transportation Director revised the regular Pre-K run from the Bison Center, and offered Grievant an extracurricular assignment transporting special needs Pre-K students to and from the Bison Center. She would begin the run at approximately 11:00 am and have the run completed by 12:30 pm.

14. Grievant refused the assignment, indicating it interfered with her daytime position cleaning houses.

15. On January 5, 2009, upon notification of Grievant's refusal to accept the offered extracurricular run, Respondent stopped paying Grievant for the extracurricular run.

16. Simultaneously with Grievant's run being terminated, a different extracurricular run was needed without any prior notice. Mr. Augustus Porter, a less senior

bus operator, was assigned that run until it could be posted. When it was posted, it was awarded to Mr. James C. Dyer who is more senior than Grievant. There were other extracurricular shuttle runs driven by less senior bus operators. These runs began at approximately 7:30 am and went until approximately 11:30 am.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

"It is well established that county boards of education must utilize the notice and hearing procedures of W. VA. CODE §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental assignment under W. VA. CODE § 18A-4-16, unless the assignment expires under its own terms. *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986); *Smith v. Bd. of Educ.*, 176 W. Va. 65, 341 S.E.2d 685 (1985); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 97-22-020 (July 7, 1997); *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Doss v. Mason County Bd. of Educ.*, Docket No. 96-26-108 (Sept. 30, 1996); *Ramey v. Lincoln County Bd. of Educ.*, Docket No. 94-02-002(June 3, 1994). *See 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)." *Hixenbaugh/Mullins v. Monongalia County Bd. of Educ.*, Docket No. 99-30-530

(April 24, 2000). There is no question that Grievant did not receive the required notice in the Spring of 2008, that her extracurricular run would not exist after the end of the 2007-2008 school year. Respondent did not discover the change for the Pre-K students until the day before school started.

Respondent attempted to correct the problem by first continuing to pay Grievant for the terminated run, and then attempting to follow the level I decision by providing her with an extracurricular run transporting special needs Pre-K students to and from the Bison Center. However, Grievant refused to accept the extracurricular run, but expected to continue receiving payment. Grievant testified that her reason for not taking the extracurricular run was that it was not what she bid on and was in the middle of the day. Also, when her run was initially terminated, she took on the responsibility of cleaning more houses to earn more money. Yet, Grievant made it clear in her testimony that regardless of whether she had private employment, she would not accept the offered extracurricular run because it would "tie up the middle of her day." Level III, Transcript.

Respondent did not properly terminate Grievant's extracurricular run. This was done without malice or intention, and resulted from a sudden change in the schedule for these students. Respondent has made every opportunity to correct that wrong. Respondent continued to pay Grievant. Respondent then went back to review the runs to determine if it could provide Grievant with a similar run to what she had. Respondent has fulfilled its obligations to Grievant. Grievant has made a conscious choice not to tie up the middle part of her day with this extracurricular run. Respondent is no longer required to pay.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. "It is well established that county boards of education must utilize the notice and hearing procedures of W. VA. CODE §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental assignment under W. VA. CODE § 18A-4-16, unless the assignment expires under its own terms. *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986); *Smith v. Bd. of Educ.*, 176 W. Va. 65, 341 S.E.2d 685 (1985); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 97-22-020 (July 7, 1997); *Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Doss v. Mason County Bd. of Educ.*, Docket No. 96-26-108 (Sept. 30, 1996); *Ramey v. Lincoln County Bd. of Educ.*, Docket No. 94-02-002(June 3, 1994). *See 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)." *Hixenbaugh/Mullins v. Monongalia County Bd. of Educ.*, Docket No. 99-30-530 (April 24, 2000).

3. West Virginia Department of Education state policy states, "Any person accepting employment as a school bus operator shall accept such position with the

understanding that the responsibilities involved are his/her primary employment, and that such employment shall not be limited, or interfered with, by any commitment as a result of any other employment." 126 CSR 92 §14.1.

4. Respondent did not terminate Grievant's extracurricular contract in the appropriate manner prescribed by state code.

5. Respondent fulfilled all its obligations to Grievant under the level I decision by offering her a similar extracurricular run, varying only in the time with which it was to accomplished.

6. Grievant has failed to meet her burden beyond a reasonable doubt that Respondent owed her any further duty with respect to the extracurricular run.

Therefore, this grievance is **DENIED**.

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. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 4, 2009

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Wendy Campbell Elswick
Administrative Law Judge