THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID CRISEL,
Grievant,

Docket No. 2010-0311-WayED

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, David Crisel, on September 9, 2009, against his employer, the Wayne County Board of Education. The statement of grievance reads:

> Respondent terminated the extracurricular assignment of Grievant at the end of the 2008-2009 school year along with those of all the other bus operators. Respondent recalled all of the other bus operators to an extracurricular assignment even though Grievant is superior in seniority to all of them. Grievant cites a violated of W.Va. Code §§18A-4-8b and 18A-4-16.

As relief Grievant seeks:

> Instatement into an extracurricular assignment and compensation for lost wages with interest.

A hearing was held at level one on October 16, 2009, and the grievance was denied at that level on October 19, 2009. A level two mediation session was conducted on December 18, 2009. Appeal to level three was made on December 22, 2009, and a level three hearing was conducted on March 22, 2010, before Administrative Law Judge Wendy A. Elswick[1] at the Public Employees Grievance Board in Charleston, West Virginia. Grievant was represented by counsel, John Roush, Esq., of WVSSPA, and Respondent

[1]This matter was transferred to the undersigned ALJ for administrative reasons.

was represented by counsel, David A. Lycan, Esq. This matter became mature for decision on April 21, 2010, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a bus operator for the Wayne County Board of Education. Respondent terminated all of its county extracurricular bus run assignments of the 2008-2009 school year for the then coming 2009-2010 school year. All of the bus operators' extracurricular assignments from the 2008-2009 school year were thereafter restored by the Respondent to the same bus operators for the 2009-2010 school year with the exception of one of Grievant's two extracurricular bus run assignments. Grievant argued that he should have been restored to one of the extracurricular assignments based upon his seniority over the other bus operators.

The Grievance is denied.

The following Findings of Fact are properly made from the record developed at the level three hearing.

Findings of Fact

1. Grievant is employed as a bus operator by the Respondent, the Wayne County Board of Education.
2. Grievant is the Respondent's most senior bus operator.
3. During the 2008-2009 school year, the Respondent timely terminated all of its county extracurricular bus run assignments of the 2008-2009 school year for the then coming 2009-2010 school year.

4. All of the bus operators' extracurricular assignments from the 2008-2009 school year were thereafter restored by the Respondent to the same bus operators for the 2009-2010 school year with the exception of one of the Grievant's two extracurricular bus run assignments, the exception being the Spring Valley High School shuttle bus run.

5. The Spring Valley High School shuttle bus run was no longer necessary at the beginning of the 2009-2010 school year.

6. Grievant filed a grievance asserting the Respondent should have called the Grievant back to a restored extracurricular assignment ahead of less senior bus operators.

Discussion

This grievance does not challenge a disciplinary action, therefore Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence.[2] "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 Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Respondent does not dispute that Grievant is the most senior bus operator for Wayne County. However, Grievant believes his seniority should restore him to extracurricular assignments ahead of less senior bus operators. Grievant asserts the Respondent's failure to call him back ahead of less senior bus operators was a violation of W.Va. Code §§ 18A-4-8b, 18A-4-8g and 18A-4-16. Respondent argued that West

[2] Procedural Rules of the West Virginia Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008)

Virginia Code § 18A-4-16(6) as applied in *Graham, et al. v. Wood Co. Bd. of Educ.*, Docket No. 2008-0261-CONS (Nov. 20, 2008), gives an employee who previously held an assignment, which has been terminated for lack of need only to be reestablished, the option of performing the assignment.

West Virginia Code § 18A-4-16(6) provides the proper procedure to be used when extracurricular assignments are terminated for lack of need:

> 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 [§18A-2-7], 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 [§ 18A-4-8b] of this article.

There is no dispute that the termination was due to lack of need. Grievant submitted a list of terminated extracurricular bus runs for the 2009-2010 school year. (Grievant's Exhibit 3). Grievant did not argue or establish that the extracurricular assignments for school year 2009-2010 were not assignments that continue to exist or that have been reestablished from the previous school year.

Grievant incorrectly argues that seniority of the employees involved always controls the reduction in school service personnel force, whether of regular positions or extracurricular assignments. In addition, Grievant misinterprets W.Va. Code § 18A-4-16(6) to read in conjunction with West Virginia Code § 18A-4-8b to preclude reinstatement of less senior employees to extracurricular assignments. Although West Virginia Code § 18A-4-8b requires service personnel to be recalled based upon seniority when faced with a

reduction of force, the elimination of service personnel extracurricular assignments for lack of need is controlled by West Virginia Code § 18A-4-16(6). "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). Likewise, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma- Chief Logan* No. 4523, VFW of the United States, Inc., 147 W.Va. 645, 129 S.E.2d 921 (1963).

When a service personnel's extracurricular assignment is terminated based upon lack of need, West Virginia Code § 18A-4-16 applies. The employee who held the extracurricular assignment the previous school year shall have the option of retaining the assignment if (1) it continues to exist in any succeeding school year or (2) if it is terminated and reestablished in any succeeding school year. If the employee declines the extracurricular assignment, then the assignment shall be filled based upon seniority pursuant to W.Va. Code § 18A-4-8b.

Grievant argued that the decision in *Board of Education v. Smith*, 502 S.E.2d 214 (W.Va. 1998) holds precedential value. In that case, the procedures of W.Va. Code § 18A-4-8b were followed when extracurricular service personnel assignments were eliminated. After *Smith* was upheld by the Supreme Court of Appeals of West Virginia in 1998, paragraph 6 of W.Va. Code § 18A-4-16 was amended effective July 1, 2002. Grievant's situation must be evaluated under the West Virginia Code effective at the time of the occurrence in question. Therefore, W.Va. Code § 18A-4-16(6) applies to the facts in this

proceeding. In *Garner v. Monongalia County Board of Education*, Docket No. 02-30-352 (Mar. 28, 2003), the Administrative Law Judge held that the amended W.Va. Code § 18A-4-16(6) does not eliminate any precedential value of prior cases. That decision relied upon West Virginia Code § 18A-4-8b because West Virginia Code § 18A-4-16(6) was not effective at the time of the incident giving rise to that proceeding and because the extracurricular assignment in question did not continue to exist nor was it reestablished in a succeeding school year.

West Virginia Code § 18A-4-16(6) is the controlling statute in the present matter. The extracurricular assignments for the 2009-2010 school year were terminated then reestablished in a succeeding school year. The bus operators previously holding the extracurricular assignments were properly reinstated.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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 Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. West Virginia Code § 18A-4-16(6) provides the proper procedure to be used when extracurricular assignments are terminated for lack of need:

> 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 [§18A-2-7], 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 [§ 18A-4-8b] of this article.

3. "West Virginia Code § 18A-4-16(6) applies to extracurricular bus assignments and must be strictly construed in favor of the employee. Where an assignment continues to exist or is reestablished in a subsequent year, an employee shall be given the option of performing the assignment." *Graham, et al. v. Wood Co. Bd. of Educ.*, Docket No. 2008-0261-CONS (Nov. 20, 2008).

4. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984).

5. West Virginia Code § 18A-4-16(6), effective as an amendment on July 1, 2002, is the controlling statute in the present matter.

6. Grievant did not establish that the extracurricular assignments for the 2009-2010 school year were not assignments that continue to exist or have not been reestablished from the previous school year.

7. Respondent properly restored the extracurricular bus run assignments to the same bus operators that held the same assignments the previous school year.

8. Grievant did not prove that he was entitled to reinstatement into a second extracurricular assignment ahead of less senior bus operators.

9. The Grievant did not prove that he is entitled to lost wages with interest. Accordingly, the 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: OCTOBER 8, 2010

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Jennifer Lea Stollings-Parr
Administrative Law Judge