THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN CARPENTER, et al.,
Grievants,

v. **DOCKET NO. 2010-0519-CONS**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on September 29, 2009, by Grievants, Donald Williams, Sheila Statler, Elaine Prickett, and John Carpenter, against their employer, the Monongalia County Board of Education. The statement of grievance reads:

> Grievants contend that they were entitled to recall to vacant and/or newly created extracurricular assignments. Grievants have preferred recall status as a result of a previous reduction in force from extracurricular assignments. Grievants allege a violation of W. Va. Code 18A-4-8b & 18A-4-16.

The relief sought by Grievants is "instatement into the extracurricular assignments with compensation for lost wages with interest."

A hearing was held at level one on November 19, 2009, and the grievance was denied at that level on December 15, 2009. Grievants appealed to level two on December 31, 2009, and a mediation session was held on April 5, 2010. Grievants appealed to level three on April 26, 2010, and a level three hearing was held before the undersigned Administrative Law Judge, in the Grievance Board's Westover office on August 26, 2010. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Caradine,

Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on September 28, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were properly notified that their extracurricular contracts were being terminated at the end of the subject school year. Grievants do not contend that their extracurricular assignments have been reestablished in any school year, rather they assert that Respondent was required to place them on a preferred recall list, and use that list to place them in extracurricular assignments which became available. Respondent is not required to establish a preferred recall list consisting of employees whose extracurricular contracts were terminated.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant Prickett has been employed by the Monongalia County Board of Education ("MBOE") as a Bus Operator for 20 years. She held a noon extracurricular run during the 2005-2006 school year transporting special needs students and Head Start students to Suncrest Primary School. She was given notice in the Spring of 2006 that her contract for this run would be terminated at the end of the school year for lack of need. This run has not been reestablished, and she has held only one extracurricular run since the 2005-2006 school year, although other extracurricular runs have been posted since

then, and she has bid on them.[1] During the 2009-2010 school year Grievant Prickett was awarded an extracurricular run for two weeks in May 2010, on Fridays, referred to as the Shell Building run.

2. Grievant Williams has been employed by MBOE as a Bus Operator for 15 years. He held a noon extracurricular run during the 2005-2006 school year transporting students from Mountainview Elementary School to Sabraton School. He was given notice in the Spring of 2006 that his contract for this run would be terminated at the end of the school year for lack of need. This run has not been reestablished, and he has not held an extracurricular run since the 2005-2006 school year, although he has bid on other extracurricular runs that have been posted since then.

3. Grievant Carpenter has been employed by MBOE since 1993 as a Bus Operator. He held an extracurricular run during the 2005-2006 school year transporting Head Start students to Suncrest Primary School. He was given notice in the Spring of 2006 that his contract for this run would be terminated at the end of the school year for lack of need. This run has not been reestablished. Grievant Carpenter was awarded an extracurricular run for the 2009-2010 school year transporting students from the Monongalia Technical Education Center to work sites.

4. Grievant Statler is employed by MBOE as a Bus Operator. She held an extracurricular run during the 2006-2007 school year. She was given notice in the Spring of 2007 that her contract for this run would be terminated at the end of the school year for lack of need. This run has not been reestablished. Grievant Statler bid on several

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[1] Respondent raised a timeliness defense at level one, but did not pursue this argument at level three, and it is deemed abandoned.

extracurricular runs that were posted during the 2009-2010 school year, and was awarded one of these runs.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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).

Grievants argued that when their extracurricular contracts were terminated, they were entitled to preferred recall status, citing W. VA. CODE § 18A-4-8b. Respondent relies on *Graham v. Wood County Board of Education*, Docket No. 2008-0261-CONS (November 20, 2008), as support for its argument that the statutory preferred recall provisions are not applicable to extracurricular assignments. Grievants argue that *Graham* is "an aberration in this respect and should be distinguished or simply overturned as precedent." The undersigned does not agree.

Paragraph six of W. VA. CODE § 18A-4-16 states:

> 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.

This provision makes clear that once an employee is awarded an extracurricular assignment he or she retains that assignment from year to year, and maintains the right to that assignment even if it is eliminated in one year, and is entitled to placement in the assignment should it later be reestablished, regardless of the employee's seniority. This provision expressly states that the notice provisions of W. VA. CODE § 18A-2-7 apply to the termination of extracurricular assignments. It does not state that employees are to be placed on a preferred recall list. Indeed, were Respondent to use a preferred recall list, such a procedure would conflict with the requirement that the employee who held the assignment be returned to the assignment should it be reestablished in *any* succeeding school year, as the employee who held the assignment has been given preference over any person with more seniority on any preferred recall list. "The BOE is not required to utilize a preferred recall list" when extracurricular assignments have been terminated for lack of need. *Graham, supra.*

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't*

of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. Once an employee is awarded an extracurricular assignment he or she retains that assignment from year to year, and maintains the right to that assignment even if it is eliminated, and is entitled to placement in the assignment should it later be reestablished, regardless of the employee's seniority. W. VA. CODE § 18A-4-16(6). This provision expressly states that the notice provisions of W. VA. CODE § 18A-2-7 apply to the termination of extracurricular assignments. It does not state that employees are to be placed on a preferred recall list.

3. "The BOE is not required to utilize a preferred recall list" when extracurricular assignments have been terminated for lack of need. *Graham v. Wood County Bd. of Educ.*, Docket No. 2008-0261-CONS (Nov. 20, 2008).

Accordingly, 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: February 10, 2011