THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ILLA POWROZNIK-HESS,
Grievant,

v. **DOCKET NO. 2010-0498-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on October 2, 2009, by Grievant, Illa Powroznik-Hess. Her statement of grievance reads:

> Posted a position, Job #2009-396, 8-26-09, Job1A, then pulled the posting, reposted one half of original posting to better fit the description of another driver's previously held position. The other driver has less seniority than myself, nor had the other driver been sent a RIF letter. New Job #2009-419, Job 1C, posting SPLIT of original posting!

The relief sought by Grievant is "[m]y previously held four day a week position, not a two day a week position. Financially compensated accordingly, from 9-14-09."

A hearing was held at level one on December 4, 2009, and the grievance was denied at that level on December 15, 2009. Grievant appealed to level two on December 22, 2009, and a mediation session was held on March 10, 2010. Grievant appealed to level three on March 23, 2010, and a level three hearing was held before the undersigned Administrative Law Judge, in the Grievance Board's Westover office on August 31, 2010. Grievant was represented by Mary Snelson, West Virginia Education Association, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP.

This matter became mature for decision on or about October 4, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued Respondent acted improperly when it withdrew a posting for a four day a week Work Program extracurricular run after she applied for it, and that she should have been placed in the assignment because she had held a four day a week Work Program run the preceding year. Respondent withdrew the posting after it learned it had failed to timely provide a reduction in force notice to the bus operator who had held this same assignment the preceding school year. Respondent placed that bus operator in the assignment two days a week, which is the assignment she held the preceding year, and reposted the assignment for the remaining two days a week. Respondent had the authority to withdraw the posting, and Grievant did not demonstrate she was entitled to the assignment. The fact that the original posting and Grievant's assignment the preceding school year were both four days a week does not make them the same assignment.

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

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a Bus Operator for 31 years.

2. MBOE Bus Operators transport special needs students from the Monongalia Technical Education Center ("MTEC") to work sites and back during the school day ("Work Program runs"). The students and job sites change every six weeks.

3. During the 2008-2009 school year, Grievant had a Work Program run on Monday and Wednesday, picking students up at two work sites, beginning at 10:05 a.m., and returning to MTEC with the students at 10:21 a.m. On Tuesdays and Thursdays she also had a Work Program run, picking up students at a work site at 10:00 a.m., and returning the students to MTEC at 10:21 a.m.

4. During the 2008-2009 school year, Charlene McMillen, a Bus Operator employed by MBOE, had a Work Program run on Monday and Wednesday, picking up students at MTEC at 8:50 a.m., and transporting them to three work sites by 9:10 a.m. Then at 10:30 a.m., she began picking these students up at these same three work sites, and transported them back to MTEC by 11:00 a.m.

5. During the Spring of 2009, MBOE sent all its bus operators who had Work Program runs reduction in force ("RIF") letters, except Ms. McMillen.

6. Grievant received a RIF letter related to her Work Program runs, and she did not contest the RIF.

7. MBOE intended to send Ms. McMillen a RIF letter, but because of a mistake, this letter was not sent to her.

8. On August 26, 2009, MBOE posted a Work Program run, Job Number 2009-396, which entailed transporting students from MTEC to various work sites Monday through Thursday, from 8:50 a.m. to 9:30 a.m. Grievant bid on this run.

9. When Ms. McMillen saw the posting, she advised Rick Williams, MBOE's Assistant Manager of Human Resources, that she had not received a RIF letter, and that she was entitled to retain her Work Program run for the 2009-2010 school year.

10. Prior to filling the position, MBOE pulled the posting for Job Number 2009-

396.

11. For the 2009-2010 school year, Ms. McMillen was assigned a Work Program run transporting students from MTEC to various work sites on Mondays and Wednesdays from 8:50 a.m. to 9:15 a.m. She also was assigned to transport the students from the work sites back to MTEC on these days, from 10:25 a.m. to 10:55 a.m.

12. On September 9, 2009, MBOE posted Job Number 2009-419, which was an extracurricular assignment on Tuesdays and Thursdays, transporting students from MTEC to their jobs as part of the Work Program, from 8:50 a.m. to 9:15 a.m . Grievant bid on this extracurricular job, and was awarded the job.

13. Grievant also received a four day a week afternoon Work Program run for the 2009-2010 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

Grievant argued she was entitled to the job as originally posted, because it was a

four day a week mid-morning Work Program run, and she held a four day a week mid-morning Work Program run the previous school year. Respondent argued that it was required to return Ms. McMillen to the extracurricular assignment she held during the preceding year because of the failure to send her a RIF letter, and it did so; and that it had the discretion to withdraw the posting at any time.

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.

"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). As was the case with Grievant in an earlier grievance (*Powroznik-Hess v. Monongalia County Board of Education*, Docket No. 07-30-108 (May 29, 2008)), there is no question that Ms. McMillen did not receive notice in the Spring of 2009, that her extracurricular run would not exist after the end of the 2008-2009 school year. "Respondent was required to give notice to [Ms. McMillen] during the Spring of [2009], that her extracurricular run was being terminated." *Id.*

It is also clear that Ms. McMillen's extracurricular assignment for the 2009-2010 school year was nearly identical to the assignment she held the preceding school year. She departed from MTEC at 8:50 a.m. both years, and transported students to their job sites, ending at 9:10 a.m. one year and 9:15 a.m. the next, thereby extending the assignment by just five minutes. She then picked up the students at their job sites and returned them to MTEC, with only a five minute difference in the beginning and ending times from one year to the next, but a total time of 30 minutes for both assignments. This return trip, however, was not part of the posting at issue, and it will be noted that although Grievant makes the trip from MTEC to the work sites on Tuesdays and Thursdays, she does not return the students to MTEC on those days. Respondent certainly acted properly in placing Ms. McMillen in this assignment.[1]

Assuming that Grievant had the right to be returned to the same assignment she held the preceding school year, if it existed, the assignment at issue bears absolutely no

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[1] There was some evidence introduced also regarding a student added to Ms. McMillen's assignment who needed a wheelchair, and whether Grievant could transport that student. The undersigned does not find this evidence to be relevant.

resemblance to the assignment Grievant held during the preceding school year, except that it was originally posted as a four day a week run, and it is a Work Program run. Grievant did not even transport students from MTEC to their work sites the preceding school year. Her assignment was to pick up the students at their work sites, beginning at 10:05 a.m., not 8:50 a.m., and transport them back to MTEC, and it was a 16 minute assignment. The assignment at issue involved transporting the students in the opposite direction, from MTEC to the work sites, beginning at 8:50 a.m., and was a 40 minute assignment as originally posted, but apparently was later reduced to a 25 minute assignment. Under Grievant's theory that the runs are the same because they were both, as originally posted, four days a week, the times of the runs are irrelevant, and Grievant in fact received a four day a week Work Program run during the 2009-2010 school year, in the afternoon. Grievant did not demonstrate that the posted run was the same run she held the preceding school year.

Finally, the Grievance Board has long held that Respondent had the authority to withdraw the posting prior to filling the assignment, and Grievant acquired no right to the assignment merely by her application for it. *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998). *See Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the

burden of proving her 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. "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. "Respondent was required to give notice to [Ms. McMillen] during the Spring of [2009], that her extracurricular run was being terminated." *Powroznik-Hess v. Monongalia County Board of Education*, Docket No. 07-30-108 (May 29, 2008).

4. Respondent had the authority to withdraw the posting prior to filling the assignment, and Grievant acquired no right to the assignment merely by her application

for it. *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998). *See Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990).

5. Grievant did not demonstrate she was entitled to the extracurricular assignment awarded to Ms. McMillen. The fact that the original posting and Grievant's assignment the preceding school year were both four day a week assignments in the Work Program does not make them the same assignment when all other aspects of the assignments, such as starting and ending time, origin of the assignments, and total transportation time are completely different.

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