WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA SHANTIE
Grievant,

v. **Docket No. 2013-0870-PutED**

PUTNAM COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Deborah Shantie, is employed by Respondent, the Putnam County Board of Education ("the Board") as a school bus driver. On December 12, 2012, Ms. Shantie filed this grievance. The statement of grievance is, "WV§18A-2-7 and WV§18A-2-7 [sic] [1] No RIF/Transfer notice; 18A-4-8a(j) and18A-2-6 Agreed upon changes in schedule; WV§18A-4-8(m)(2) Relegation, 18A-2-5 contract terms." The grievance includes an attached, additional statement of grievance that provides:

> "Ms. Shantie has had the same supplemental day run for seven years. It was always run the 2nd semester. This year the school decided to change the run to 2nd and 4th nine weeks. Shantee [sic] agreed to the change is [sic] schedule. Halfway through 2nd nine weeks Shantie was pulled from job and it was placed on "the trip Board" and given to another driver while remainder of 2nd nine weeks is [sic] posted. It has been the past procedure for the nurse instructor to advise Shantie when run would start. This year when she advised Shantie run would start in November as opposed to January, Shantie agreed to start run early. Sometime later it was explained that the nurse instructors had decided to change the period for the students to complete their work assignments form

[1] W. VA. CODE § 18A-2-8 was likely intended here.

> [sic] the 2nd semester to the 2nd and 4th nine weeks. Shantie agreed to this change and continued to perform the duties of the contract. In early December Shantie was advised that she would be pulled from the run, it would be temporarily assigned through the "trip the Board" and that it would be placed up for bid. Shantie did not receive the required notice the previous year that her contract terms would be cut and reduced.

As relief, Grievant seeks, "[p]ayment for missed run with interest and all other related benefits [and] reinstatement of contract."

A Level One conference was held on January 9, 2013. Grievant appeared with her representative, Mr. Ben Barkey of the West Virginia Education Association. Rebecca Tinder, Esq. represented Respondent, Putnam County Board of Education. A mediation session was held on March 11, 2013. A Level Three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on June 24, 2013. Grievant appeared at the hearing with her representative, Mr. Ben Barkey of the West Virginia Education Association. Rebecca Tinder, Esq., represented Respondent, Putnam County Board Education. The parties submitted Proposed Findings of Fact and Conclusions of Law, which were received at the West Virginia Public Employees Grievance Board on August 7, 2013. This grievance became mature for decision on that date.

Synopsis

Grievant held an extracurricular contract with the Board to transport nursing school students to and from school and work during the "second semester" on an "as needed" basis, from the 2007-2008 through the 2012-2013 school years. This extracurricular assignment was always performed during the

second semester until the 2012-2013 school year, when Grievant agreed to a request by the nursing school instructor to transport the students during first semester, in addition to second semester. This request was unknown to and unauthorized by the Board. When the Board discovered that Grievant was transporting students during first semester, it instructed Grievant to halt the run, posted the new, first semester extracurricular assignment for the nursing program and filled it with the most senior/qualified applicant. Grievant maintained her contract with the Board for the second semester extracurricular assignment and performed all of the runs required during that semester.

Grievant argues that her extracurricular contract was substantially changed because some of the nursing school runs were needed and performed during the first semester, rather than exclusively in the second semester. Due to this asserted change, Grievant contends that Respondent was required to provide her with notice and a hearing pursuant to W. VA. CODE §§ 18A-2-8 and 18A-2-7, but failed to do so. Additionally, Grievant contends that Respondent is in violation of the following statutory provisions: W. VA. CODE §§ 18A-4-8a(j), which requires written agreement to changes in schedule; W. VA. CODE § 18A-2-6, the continuing contract status provision; W. VA. CODE § 18A-4-8(m)(2), the relegation provision, and W. VA. CODE § 18A-2-5, which specifies the form of the contract required between service personnel and the Board. In addition, Grievant asserts that the Board should not be able to use the broad term "as needed" in her contract and posting to cover any eventuality to nullify its obligation to notify her of the changes in her contract.

Respondent denies any violation of the foregoing statutes and contends that the contract and posting clearly define the period of employment by specifying that it is to be performed "second semester" on an "as needed" basis. Respondent further asserts that it promptly removed Grievant from the first semester extracurricular assignment, and properly posted it to be filled by the most senior/qualified applicant. Grievant did not demonstrate that Respondent violated any law, rule, regulation or policy, or otherwise acted improperly.

The following Findings of Fact are made based upon the entire record developed in this matter.

Findings of Fact

1. Grievant, Deborah Shantie, is employed by the Board as a bus operator in Putnam County ("operator" or "driver"). She has been employed by the Board for 17 years, with 13 of those years as a full-time bus operator.

2. In addition to her regular bus operator contract, Grievant was awarded an Extracurricular Bus Operator assignment ("assignment" or "run") in 2007 by the Board to transport nursing students to and from their job and school sites during the second semester, as needed, which she performed from the 2007-2008 through the 2012-2013 school years.[2]

3. The extracurricular assignment awarded to Grievant in 2007 indicated that it was "as needed" in the "2nd Semester."[3] Specifically, Grievant's

[2] Grievant's assignment is properly referred to as an "extracurricular assignment" as defined by W. VA. CODE § 18A-4-16.

[3] Level Three, Respondent's Exhibit 1 - the "Posting" of the position; Level Three, Respondent's Exhibit 2 - the Personnel Action Form and Level Three, Respondent's Exhibit 3 - "Extracurricular Assignment Agreement."

January 23, 2007, contract with the Board, entitled "Putnam County Board of Education Extracurricular Assignment Agreement West Virginia Code § 18A-4-16," contained the following terms, in pertinent part:

> "… [T]he assignment of the Employee to the extracurricular assignment: bus operator, PCTC, *2nd semester*, nursing students to CAMC Teays Valley and return, as needed,… for the school year or remaining part thereof … This agreement shall continue from year to year under the same terms and conditions as hereinafter set out.. However, this agreement may be terminated or modified as provided herein…" *(Emphasis added).*
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> "… This Agreement may be terminated or modified at any time by the mutual consent of the Board and the Employee; may be terminated by the Board for cause in accordance with the requirements set forth in West Virginia Code §§ 18A-2-7 and 18A-2-8; or, may be terminated upon 10 days' notice, for any reason, within the sole discretion of the Superintendent, determined to be within the best interest of the District."[4] *Id.*

4. The "Putnam County Schools Vacancy Bulletin" ("Bulletin" or "posting"), dated January 4, 2007, detailing Grievant's extracurricular run stated: "Locations and length of routes may change determined by Coordinator of Transportation, dependent upon the number and/or location of students requiring transportation services." The Bulletin further specified: "PRESENT RUN: Nursing Students to CAMC Teays Valley - Current Schedule -- *2nd Semester Only*… Schedule to be determined by Coordinator of Transportation" (*Emphasis added*).

5. Prior to the 2012-2013 school year, the nursing students were transported between the work and school site(s) exclusively during the second semester of the school year. However, the number of days on which transport

[4] Level Three, Respondent's Exhibit 3 - "Extracurricular Assignment Agreement."

was required, and the beginning and ending dates for transport varied within the second semester depending on the needs of the course.

6. Grievant was paid only for the days on which she was required to transport students during the second semester, in accordance with her extracurricular contract.

7. All of the extracurricular bus operator positions in Putnam County are limited by the language, "as needed." Any position which does not require transportation during both semesters, for the full school year of 200 days, is posted "as needed."[5]

8. When a bus operator is under contract with the Board on an "as needed" basis, and the timing/dates of the "as needed" run are unknown to the Board, the driver is ineligible to apply for another position.[6]

9. The Board asks its applicants for the "as needed" positions whether they have any conflict or problem with acceptance of an "as needed" position, given that the dates of the run are uncertain.[7]

10. For the 2012-2013 school term, the nursing instructor and school administration changed the nursing course in such a way that it effected the bus schedule.[8] Rather than having all of the nursing classes and corresponding bus “runs” during the second semester, the bus was required to run the second nine

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[5] Level Three testimony of Director of Personnel, Barbara Brazeau.
[6] *Id.*
[7] *Id.*
[8] The nursing instructor’s name, though provided at hearing, is not used herein as it is irrelevant to the determination of this Grievance.

weeks (second half of the first semester) and fourth nine weeks (second half of the second semester).

11. The nursing instructor advised Grievant that the requirements of the extracurricular "run" had been changed. Without consulting the Board's Director of Transportation, Mr. Charlie Tribble, concerning this change, the nursing instructor told Grievant that she would be needed to transport students during the second and fourth nine weeks for the 2012-2013 school year, as opposed to only the second semester. Grievant agreed to the proposed change in schedule and began to transport the students as requested.

12. Neither the school administration, nor the nurse instructor advised the Director of Transportation, the Director of Personnel or the school's principal of the need for an extracurricular run in the first semester.

13. It was the admitted responsibility of the school where the nursing program was administered to contact the Director of Transportation concerning the change in the nursing school curriculum/transportation requirements.

14. Director of Transportation Tribble and Director of Personnel Brazeau did not know, until approximately half way through the second nine weeks, that Grievant was driving the nursing students during the first semester.

15. When the Board learned that Grievant was transporting nursing students during first semester, Board officials promptly removed Grievant from

the new, first semester extracurricular run, because the Board had not contracted with Grievant to perform the run during first semester.[9]

16. The Board did not provide a written agreement to Grievant to either modify the second semester run to include the runs which she performed during first semester or to award the new, first semester extracurricular run to her.

17. The new, first semester extracurricular run for transporting the nursing students during first semester of 2012-2013 was posted. An individual with more seniority than Grievant was selected to fill the position.

18. Grievant drove the extracurricular nursing runs a total of thirty-seven times during the 2012-2013 school year when adding the runs she drove in both the first and second semester. She had two more runs in 2012-2013 than in 2011-2012.[10]

19. The number of runs Grievant took each year varied from a minimum of thirty-five in the school year 2011-2012 to fifty-one in the school year 2006-2007, but all of the runs were during second semester.

20. Grievant was paid for all of the days on which she transported the nursing students during both the second and first semesters.

21. Drivers for the 200-day runs for the gifted students receive notification if the locations of the schools for the gifted programs are changed. The Board does not re-post these positions when there is a change in the gifted

[9] A substitute was placed into the extracurricular position while it was posted and bid upon.

[10] Level Three, Joint Exhibit 1, "Shantie SR26 Run Summary."

school location, but allows the gifted drivers to continue with their runs if they choose.

22. Grievant's extracurricular run was not eliminated for the second semester of the 2012-2013 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). "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 asserts that the Board should not be able to use the broad term, "as needed" to cover any eventuality to nullify its obligation to notify Grievant of the substantial changes in her contract**.** Grievant testified that she believed "as needed" indicated that her contract might begin at any time. Apparently, Grievant

believed that the "start" date for the extracurricular run might vary by weeks or even months, given that she began to perform the run during first semester. In addressing the fact that the contract and posting indicate “second semester” only, Grievant admitted that she simply did not remember that the second semester was specified in her contract.[11] Respondent asserts that the contract and posting clearly define the period of employment as second semester only. Respondent further contends that the language, "as needed," does not guarantee a particular number of days for the run and clearly communicates that Grievant is to make the runs on dates when transportation is needed for the nursing program. Because there is no guarantee of the number of days of transport, it is Respondent’s position that notice of the drop in the number of Grievant’s runs is not required. Given this dispute, both Grievant’s contract and the posting of the extracurricular position/run must be analyzed, particularly as to the meaning of the language "as needed.”

In *Weaver v. Mason County Board of Education,* Docket No. 94-26-129 (November 22, 1994) respondent posted positions for two "Maintenance Employees Temporary," "as needed.”[12] However, after these employees were hired, they worked on a daily basis, and received regular pay and certain benefits. The Grievance Board in *Weaver*, *supra*., noted that the posting provision of W. VA. CODE 18A-4-8b specifically requires postings to include “the period of employment" and determined that the postings did not allow the

[11] Grievant’s continuing contract was dated January 22, 2007.

[12] No further details concerning the contract language were provided in *Weaver, supra.*

grievant the opportunity to evaluate whether he wanted to compete for the positions at issue, because the period of employment was unclear. The Grievance Board found that grievant was correct in complaining that because no definite period of employment had been prescribed by the posting, these positions were not truly “temporary.” The Grievance Board observed that the term of employment for the “as needed,” temporary maintenance workers was so indefinite that those workers could still have been working for respondent long after grievant had retired. "One of the obvious purposes of posting is to provide information 'helpful to the employees to understand the particulars of the job.' W. VA. CODE §18A-4-8b.” *Weaver, supra*. Information in a posting must be "essentially" correct so applicants will know what is expected of the position. *Barker v. Kanawha County Bd. of Educ.,* Docket No. 90-20-505 (February 22, 1991). The Grievance Board in *Weaver, supra*, concluded that respondent had violated the spirit and intent of the posting provision of W. VA. CODE §18A-4-8b by failing to set forth in its notice a specific duration for the "period of employment" established for these positions.

However, the posting in the present grievance, as distinguished from the postings in *Weaver, supra*, does not have "as needed" as the sole description of the nature or the duration of the employment. Rather, in this posting, the period of employment is also included. It is plainly and unambiguously specified as "second semester only." Therefore, "as needed," is not indefinite as used in this posting. By including both "second semester only" and "as needed" as terms describing the extracurricular assignment in the posting, the Board achieved the

objective of the posting requirement at W. VA. CODE §18A-4-8b, as these descriptions "help[s] the employee to understand the particulars of the job." The undersigned concludes that this language is sufficient to communicate to that Grievant is only permitted to perform the run during the second semester and is guaranteed no particular number of days for the run.

The "period of employment" for Grievant's extracurricular run is also provided in her contract as "second semester," with the further direction that transportation of students would only be made, "as needed." Given that Grievant's contract with Respondent was explicitly limited to performance during the "second semester" in both the posting and the contract, the term "as needed" cannot be misconstrued to alter the time period for performance of the extracurricular contract. Contrary to Grievant's assertion, the contractual language, "as needed," clearly does not permit a "start date" during the first semester.[13] Grievant's contract unambiguously states that Grievant is assigned to transport students only during second semester and only on the days required by the nursing school program.

Grievant further contends that Respondent violated W. VA. CODE § 18A-2-5, which specifies the form of the contract required between service personnel and the Board, but did not specify what that violation was. W. VA. CODE § 18A-2-5 requires, *inter alia*: the job classification, place of assignment, term of

[13] Though Grievant testified that she believed the start date for her extracurricular assignment could vary greatly, in her Finding of Facts and Conclusions of Law, she did not advance the argument that she was entitled to the first semester run.

employment and salary of the employee. Grievant had a contract with the Board that complied with the requirements of W. VA. CODE § 18A-2-5. In particular, the contract specifically limited performance of the contract to second semester and directed that Grievant would be paid on an "as needed" basis. Therefore, the undersigned finds no violation of W. VA. CODE § 18A-2-5 by the Board.

"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)."

Grievant asserts that her contract for the extracurricular run was substantially changed and that she is therefore entitled to the notice and hearing procedures of W. VA. CODE §§ 18A-2-8 and 18A-2-7. The provision at W. VA. CODE § 18A-2-8 states, *inter alia*, the bases upon which boards of education may suspend or dismiss an employee and directs that the employee must be given written notice and a hearing concerning the dismissal or termination. Grievant

was neither suspended nor dismissed. Therefore, the provisions of W. VA. CODE § 18A-2-8 are inapplicable in this matter.

In addition, Grievant asserts that the contract protections of W. VA. CODE § 18A-2-7 concerning reduction in force and transfer notice should be afforded to her under these circumstances, wherein the substantial change to her contract operated to reduce her runs/compensation by half. W. VA. CODE § 18A-2-7 is inapplicable in this instance because there was no reduction in force or transfer of Grievant. Rather, Grievant's contract for the extracurricular run for the nursing students remained in effect, as needed, for the second semester of the 2012-2013 school year.

Additionally, Grievant asserts that her daily work schedule was changed during the school year without her written consent in violation of W. VA. CODE § 18A-4-8a(j), which provides, "no service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee."[14] Grievant did not give her written consent to perform less runs for the nursing school program during the second semester. However, as more fully discussed above, Grievant's "daily work schedule" was already subject to a change or drop in the number of days required for the run because her

[14] Grievant did not elaborate on this argument in her Findings of Facts and Conclusions of Law. Thus, it is not entirely clear what argument she is advancing with respect to this code provision.

assignment with the Board was "as needed." Therefore, this is not the type of “change” contemplated by W. VA. CODE § 18A-4-8a(j), which would require Grievant’s written consent.

Also, Grievant did not give her written consent to undertaking the new extracurricular first semester run. She nonetheless did so when requested by the nursing instructor. However, the Board was unaware of the unauthorized request of the nursing instructor. The nursing instructor was not officially empowered by the Board to modify the terms of Grievant's contract to include a first semester extracurricular run. A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964). *Also see, Syl. Pt. 2, West Virginia Public Employees Ins. Bd. v. Blue Cross Hospital Service, Inc.,* 174 W.Va. 605, 328 S.E.2d 356 (1985). Unlawful or *ultra vires* statements or actions by public officials when functioning in their governmental capacity are not binding upon the agency. *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E. 2d 744 (W.Va. 1991); *Daniels v. Greenbrier County Bd. of Educ.,* Docket No. 96-13-150 (July 31, 1996). Moreover, once the Board became aware of the unilateral, *ultra vires* act of the nursing instructor in requesting Grievant to undertake the first semester extracurricular run, the Board had no choice but to remove Grievant from the run and post it to be filled by the most senior/qualified applicant, as required under W. VA. CODE § 18A-4-8b(a). This code section provides that extracurricular service assignments are to be made on

the basis of seniority, qualifications and evaluation of past service. *See Harrison v. Wyoming Co. Bd. of Educ.,* Docket No. 55-88-211 (Feb. 15, 1989). Respondent acted promptly to halt the first semester run that Grievant had undertaken due to the unauthorized act of the nursing instructor. The undersigned finds that Respondent's action in removing Grievant from the first semester run in order to comply with the requirements of W. VA. CODE § 18A-4-8b(a) was appropriate in this case.[15] Given the foregoing, Respondent was foreclosed from making any written agreement with Grievant to allow her to undertake the new first semester extracurricular run. Therefore, Respondent cannot be found in violation of W. VA. CODE § 18A-4-8a(j) under the circumstances.

Grievant also contends that the Board's action in not providing notice under W. VA. CODE §§ 18A-2-8 and 18A-2-7 lacked uniformity because other bus drivers receive yearly statutory notices for changes in their contracts, such as the drivers for some of the gifted programs, and Grievant did not receive notice of the asserted change to her contract. Similarly situated employees performing like assignments and duties must be treated and compensated uniformly per the uniformity requirement at W. VA. CODE § 18A-4-5b. Ms. Brazeau testified that the gifted drivers are 200-day employees, as distinguished from those with extracurricular, "as needed" contracts such as Grievant. As such, Grievant is not

[15] In fact, Grievant acknowledged that if Respondent had not removed her from the run during first semester, other drivers would have filed grievances protesting the lack of the posting for the first semester extracurricular run for nursing school students.

similarly situated to the 200-day drivers. Therefore, notice was not required under W. VA. CODE §§ 18A-2-8 and 18A-2-7.

Grievant further avers that Respondent violated the continuing contract status provision of W. VA. CODE § 18A-2-6. The undersigned finds no violation of this provision given that Grievant's second semester assignment continued for the school year 2012-2013.

Additionally, Grievant asserts that Respondent is in violation of the relegation provision of W. VA. CODE § 18A-4-8(m)(2) which provides that:

> Without his or her written consent, a service person may not be:(2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

The language in W. VA. CODE § 18A-4-8(m) has been interpreted to mean that a board of education is prohibited from terminating an employee's contract and re-issuing it with altered compensation. *Crock v. Harrison County Board of Education,* 211 W.Va. 40, 560 S.E.2d 515 (2002). Grievant's contract was not terminated and reissued and the level of her compensation remained unchanged. She was paid at the same rate that she had always been for the hours of work she performed on an "as needed" basis for the second semester extracurricular contract. Thus, the non-relegation cause is inapplicable.

As relief, Grievant requests payment for "missed run" with interest and reinstatement of her contract. As addressed above, Grievant's second semester extracurricular contract has never been terminated or suspended and she performed all of the runs associated with it in the 2012-2013 school year.

Grievant cannot be reinstated to a position from which she was never removed. Additionally, Grievant is not entitled to payment for any "missed" runs for first semester, because her contract explicitly limited performance of her run to second semester and Respondent was prohibited from offering the new, first semester extracurricular assignment to Grievant because, if it had, it would have been in violation of W. VA. CODE §18A-4-8b(a).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, the 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). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden.

2. Grievant's extracurricular assignment was made by mutual agreement of Grievant and the Board and was limited to second semester, to be performed on an as needed basis, with no minimum guarantee of the number of days on which students would be transported.

3. Terminations of extracurricular contracts entered into pursuant to W. VA. CODE § 18A-4-16 are subject to the procedural requirements mandated

by W. VA. CODE §§ 18A-2-7 and 18A-2-8. 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).

4. Grievant did not demonstrate, by a preponderance of the evidence, that Respondent terminated her extracurricular contract or violated the notice and hearing requirements of W. VA. CODE §§ 18A-2-7 and 18A-2-8.

5. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.,* Docket No. 99-16-459 (Jan. 14, 2000). *See also Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997); *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998).

6. Respondent promptly corrected its error and properly directed Grievant to cease operating the extracurricular bus run for nursing students during the first semester in order to post and fill the position with the most senior/qualified applicant. This corrective action was proper and consistent with W. VA. CODE §18A-4-8b(a), which dictates that the boards of education must consider "seniority, qualifications and evaluation of past service" when filling service personnel positions.

7. Unlawful or *ultra vires* statements or actions by public officials when functioning in their governmental capacity are not binding upon the agency. *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E. 2d 744 (W. V (1991); *Daniels v. Greenbrier County Bd. of Educ.,* Docket No. 96-13-150 (July

31, 1996). “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964).”

8. The nurse instructor was without authority to offer the first semester run to Grievant. Her actions in altering Grievant’s second semester extracurricular assignment were *ultra vires* and not binding upon Respondent.

9. The language in W. VA. CODE § 18A-4-8(m) concerning relegation has been interpreted to mean that a board of education is prohibited from terminating an employee's contract and re-issuing it with altered compensation. *Crock v. Harrison County Board of Education,* 211 W.Va. 40, 560 S.E.2d 515 (2002).

10. Grievant failed to show that her contract was terminated or reissued or that the level of her compensation was changed. She is paid at the same rate that she has always been for the hours of work she performs, on an "as needed" basis for the second semester extracurricular contract. Grievant did not demonstrate, by a preponderance of the evidence, that the Board violated the non-relegation clause at W. VA. CODE § 18A-4-8(m).

11. Grievant’s "daily work schedule" was always subject to the change which occurred in this instance because her extracurricular assignment was "as needed." Grievant did not demonstrate that the reduction in the number of runs during her second semester was the type of “change" to her “daily work

schedule" which necessitates her written consent under W. VA. CODE § 18A-4-8a(j).

12. Grievant did not demonstrate that Respondent failed to include the necessary contractual terms in her contract required by W. VA. CODE § 18A-2-5, which specifies the form of the contract required between service personnel and the Board.

13. The "continuing contract" provision for service personnel at W. VA. CODE § 18A-2-6 provides that after three years of acceptable employment, service personnel have continuing contract status. The contract may be "modified by mutual consent of the school board and the employee, unless and until terminated ... " W. VA. CODE § 18A-2-6.

14. Grievant did not prove by a preponderance of the evidence that Respondent violated the "continuing contract" provision for service personnel at W. VA. CODE § 18A-2-6 by failing to modify her contract or otherwise.

15. Grievant failed to produce any evidence that demonstrated she was treated differently than any comparable employee of the Board.

16. When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990); *See Clark v. Putnam County Bd. of Educ.,* Docket No. 97-40-313 (April 30, 1998).

Grievant did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to the requested relief.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance the 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 the 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).

DATE: September 19, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE