THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLENA DAWN FRYE,

Grievant,

v. **Docket No. 2017-1012-LinED**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Charlena Dawn Frye, filed a level one grievance against her employer, Respondent, Lincoln County Board of Education, dated September 22, 2016, stating as follows: "I bid on an after-school job at Midway and someone with less seniority was given the position." As relief sought, "[t]he position/back pay of loss wages/Seniority." At level two, Grievant amended her statement of grievance to state, "Grievant contends the Respondent filled an extracurricular assignment at Midway with a less senior applicant in violation of W. Va. Code 18A-4-8b, 18A-4-8g and 18A-4-16. As relief sought, "Grievant seeks instatement into the extracurricular position at Midway with compensation for lost wages with interest."

Upon information and belief, a level one conference was requested by Grievant and the same was conducted. However, the record of this grievance is silent as to when such occurred. Grievant appealed to level two on January 30, 2017, and a mediation was conducted on April 21, 2017. Grievant perfected her appeal to level three on April 24, 2017. A level three hearing was conducted by the undersigned administrative law judge on July 18, 2017, at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by counsel, Joe Spradling, Esquire, of the West Virginia School

Service Personnel Association. Respondent, Lincoln County Board of Education, appeared by counsel, Leslie Tyree, Esquire.

At the July 18, 2017, hearing, counsel for Grievant informed the undersigned ALJ that the parties had reached an agreement to submit this matter for decision based upon proposed Findings of Fact and Conclusions of Law, and joint stipulations of fact. Counsel for Grievant explained that the reasoning for the agreement was that this case presented a question of law, not fact. Counsel for Grievant further stated that Grievant understood the agreement to submit the matter for decision on the proposals and the joint stipulations of fact, and that she agreed to the same. Grievant was present and did not raise any objection to what her counsel had represented. The parties declined to present any evidence at the level three hearing, explaining that all factual evidence would be addressed in their stipulations.

Based upon the agreement of the parties, the ALJ proceeded to set deadlines for the submission of the joint stipulations of fact and the proposed Findings of Fact and Conclusions of Law. Originally, the mailing date for the Joint Stipulations of Fact was August 18, 2017, and the mailing date for the proposals was September 22, 2017. Further, the ALJ informed counsel for the parties that the joint stipulations of fact were to be in writing and signed by both of them before submission. Following the hearing, the parties experienced some confusion as to due dates, and sought extensions to submit both their joint stipulations and their proposals. Ultimately, September 22, 2017, became the date for submission of the joint stipulations of fact, and October 31, 2017, the date for the submission of the proposed Findings of Fact and Conclusions of Law.

Counsel for Respondent submitted the parties' "Joint Stipulation of Facts" by email on September 26, 2017. The joint stipulations were not signed by either counsel, and the document does not state who drafted it. However, in her email, counsel for Respondent stated the following[1]:

> [a]s the Grievant has the burden of proof in this matter the document was drafted by Joe Spradling, Esq WVSSPA. As the respondents representative I have approved the statements in the document and agree with their representation of the issue in dispute between the parties. Mr Spradling and I would like the opportunity to submit Proposed Findings of Fact and Conclusions of Law which while incorporating the facts as already submitted will also include a more detailed statement.

This matter became mature for decision on November 1, 2017, upon receipt of Respondent's proposed Findings of Fact and Conclusions of Law. Grievant did not submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a bus operator. Grievant applied for an extracurricular bus run, but the same was awarded to another bus operator. Grievant claims that she should have been awarded the run because of her overall higher seniority. Respondent denies Grievant's claim and asserts that it properly awarded the run to another employee who had held the same during the last school year. Grievant failed to prove her claim by a preponderance of the evidence. Therefore, this grievance is DENIED.

[1] This quote contains the typographical errors contained in the original email communication.

The following "Joint Stipulation of Facts" contain the only facts presented by the parties.[2] Respondent submitted three proposed Findings of Fact in its submissions, but they are already included within the joint stipulations. As no other evidence was presented, the parties' "Joint Stipulation of Facts" is incorporated verbatim, and shall serve as the Grievance Board's Findings of Fact.

Joint Stipulation of Facts

1. Grievant is a bus operator for the Lincoln County Board of Education.
2. Grievant bid upon an Extra Curricular after school run at Midway Elementary School.
3. The run was awarded to Joann Richmond because she held the same run in question last school year.
4. Grievant believes that her overall higher seniority should have resulted in her being awarded the Extra Curricular run in question.
5. The Respondent believes that Ms. Richmond was correctly given the job because she held the job the prior 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. W.VA. CODE ST. R. § 156-1-3 (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,

[2] These are the "Joint Stipulation of Facts" submitted by counsel for Respondent on September 26, 2017, *verbatim*.

1988). In other words, "[t]he 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 has asserted that she was entitled to the extracurricular bus run at Midway Elementary because of her higher overall seniority. There has been no evidence presented to establish the nature of this bus run, its frequency, when Grievant applied for the position, or the number of years of seniority Grievant claims. The stipulated facts are the only evidence presented in this matter. However, Grievant has alleged some statutory violations in her statements of grievance. The undersigned will analyze the same based upon the evidence presented.

The West Virginia Code defines "extracurricular assignments," as follows:

> . . . [e]xtracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [*§ 18A-4-8*] of this article, or extra-duty assignments, as provided by section eight-b [*§ 18A-4-8b*] of this article.

W. Va. Code § 18A-4-16(1). Regarding the filling of extracurricular assignments, the West Virginia Code states the following:

> The board shall fill extracurricular assignments and vacancies in accordance with section eight-b [*§ 18A-4-8b*] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the

> county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

W. Va. Code § 18A-4-16(5). The Code further states that,

> [a]n 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 of this article.

W. Va. Code § 18A-4-16(6).

The parties have stipulated that "[t]he run was awarded to another driver with less seniority, Joann Richmond. The run was awarded to Joann Richmond because she held the same run in question last school year." As the parties agree that Ms. Richmond is another bus driver and that she held the extracurricular run in question during the last school year, such appears to comply W. Va. Code § 18A-4-16(6). As Grievant has presented no other evidence, she has failed to prove her claim by a preponderance of the evidence. Accordingly, the grievance is denied.

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. W.VA. CODE ST. R. § 156-1-3 (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. "Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [*§ 18A-4-8*] of this article, or extra-duty assignments, as provided by section eight-b [*§ 18A-4-8b*] of this article." W. Va. Code § 18A-4-16(1).

3. "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 of this article." W. Va. Code § 18A-4-16(6).

4. Grievant failed to prove by a preponderance of the evidence her claim that she was entitled to the extracurricular run.

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 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 (eff. July 7, 2008).

DATE: December 18, 2017.

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Carrie H. LeFevre
Administrative Law Judge