

BEVERLY PAYNE,

Grievant,

v.

Docket No. 96-26-047

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Beverly Payne (Grievant) filed a grievance under W. Va. Code §§ 18-29-1, et seq., on September 25, 1995, complaining that Respondent Mason County Board of Education (MCBE) terminated her extracurricular bus run without providing proper notice under W. Va. Code §§ 18A-2-6 or 18A-2-7. Following denial of the grievance at Level I, Grievant appealed to Level II where a hearing was conducted on November 1, 1995. Following an adverse Level II decision issued by MCBE Assistant Superintendent George Miller on November 6, 1995, Grievant appealed to Level III where MCBE conducted a hearing on January 22, 1996, again denying the grievance on January 23, 1996. Grievant then appealed to Level IV on February 7, 1996, and a Level IV evidentiary hearing was held in this Board's office in Charleston, West Virginia, on July 25, 1996. This matter became mature for decision upon receipt of the parties' written post-hearing arguments on August 30, 1996. The facts which are dispositive of this grievance are essentially undisputed. Accordingly, the following Findings of Fact are derived from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is employed by the Mason County Board of Education (MCBE) as a regular school bus operator, a school service personnel position.
2. In addition to a regular morning bus run transporting students from home to school and a regular afternoon bus run transporting students home from school, Grievant was employed to operate a mid-day extracurricular bus run transporting preschool handicapped children at Ashton Elementary

School (AES).

3. Grievant's mid-day run at AES operated four days each week and involved transporting students from home to school for a one-half day program and transporting another group of students who had participated in a similar one-half day program home from school.

4. During the 1994-95 school year, another MCBE school service employee, William Doss, was similarly employed to operate a mid-day extracurricular assignment transporting students to and from AES.

5. Prior to the end of the 1994-95 school year, Grievant received notice of transfer for the 1995-96 school year. This notice did not indicate that her mid-day extracurricular run was to be eliminated.

6. Shortly before the beginning of the 1995-96 school year, Grievant received verbal notification that her extracurricular bus run was being terminated. 7. Grievant and Mr. Doss operated mid-day extracurricular runs for a number of years, with each of them transporting students on a geographic basis.

8. Grievant and Mr. Doss were each paid one-half of one day's pay for each day they drove their assigned mid-day runs.

9. Grievant has greater regular seniority as a school bus operator than Mr. Doss. G Ex 1 at L II.

10. At the beginning of the 1995-96 school year, Mr. Doss continued to operate a mid-day extracurricular bus run to AES until his assignment was terminated sometime after December 1995.

DISCUSSION

MCBE contends that this grievance was not initiated within the time limits set forth in W. Va. Code § 18-29-4(a)(1):

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Respondent notes in its Proposed Findings of Fact and Conclusions of Law that "the untimeliness of the grievance was cited at Level Two as a grounds for denying relief." However, W. Va. Code § 18-29-3(a)

stipulates that "[a]ny assertion by the employer that the filing of the grievance was untimely must be asserted by the employer at or before the level two hearing."

Careful scrutiny of the record through Level II fails to reveal any reference to this grievance being untimely filed until Assistant Superintendent Miller's written decision of November 6, 1995. This Grievance Board has previously concluded that W. Va. Code § 18-29-3(a) does not allow the employer to first raise a timeliness defense in the Level II decision. Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996). See also Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Accordingly, Respondent's assertion that this grievance was not timely initiated may not be considered at Level IV. Trickett, supra.

Turning to the merits of this grievance, it is well established that county boards of education must utilize the notice and hearing procedures of W. Va. Code §§ 18A-2-6 or 18A-2-7 to terminate an extracurricular or supplemental assignment, 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); 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). Respondent contends that Grievant received notice under W. Va. Code § 18A-2-6 that she was being transferred for the 1995- 96 school year, thereby satisfying applicable notice requirements. However, it is clear that Grievant did not receive notice that her extracurricular assignment was to be eliminated. [\(See footnote 1\)](#) Such specific notice is required by W. Va. Code § 18A-2-7. See Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

At Level IV, Grievant stated that she only sought compensation for the months that the extracurricular mid-day run was actually operated by Mr. Doss. Thus, as a result of MCBE's failure to adhere to the foregoing notice requirements when it terminated Grievant's extracurricular contract, Grievant is entitled to be paid one-half of one day's pay for each day during the 1995-96 school year she would have operated her bus run, until the date when Mr. Doss ceased to operate the mid-day run. [\(See footnote 2\)](#) See Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993). As Grievant has established that her extracurricular assignment was improperly terminated by MCBE, it is not necessary to address the issue of whether Grievant should have been allowed to displace Mr. Doss in his extracurricular assignment on the basis of seniority. [\(See footnote 3\)](#)

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this

matter.

CONCLUSIONS OF LAW

1. A grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95- 29-315 (Jan. 25, 1996).

3. Because MCBE failed to raise the issue of timeliness at or before the Level II hearing in this matter, this affirmative defense cannot defeat Grievant's claim at Level IV. W. Va. Code § 18-29-3(a); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

4. Terminations of extracurricular contracts entered into pursuant to W. Va. Code § 18A-4-16 are subject to the procedural requirements mandated under 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). See Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

5. MCBE failed to follow the procedures outlined in W. Va. Code § 18A-2-7 to terminate Grievant's extracurricular assignment to drive a mid-day bus run. See Doss, *supra*; Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993).

Accordingly, this grievance is **GRANTED**. MCBE is hereby **ORDERED** to pay Grievant the compensation she would have received for driving her mid-day extracurricular run during the 1995-96 school year, through the date Mr. Doss ceased to operate his assigned mid-day extracurricular run.

Any party may appeal this decision to the Circuit Court of Mason County or to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 27, 1996

[Footnote: 1](#)

An employee's extracurricular contract under W. Va. Code § 18A-4-16 is separate from their regular contract of employment. See Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1986).

[Footnote: 2](#)

It is noted that Grievant normally drove this mid-day run only four days per week.

[Footnote: 3](#)

The termination of this extra-curricular bus run was the subject of a separate grievance filed by Mr. Doss. See Doss v. Mason County Bd. of Educ., Docket No. 96-26- 108 (Sept. 30, 1996).