ROSEMARY MARSH,

Grievant,

v. DOCKET NO. 96-30-225

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Rosemary Marsh, is employed as a bus operator by the Monongalia County Board of Education (Respondent). Grievant filed this grievance, pursuant to West Virginia Code §§18-29-1, et seq., on November 6, 1995. She alleges “Respondent awarded an extracurricular/supplemental assignment to a less senior employee in violation of West Virginia Code §18A-4-8b.” Grievant also alleges Respondent violated W. Va. Code §§ 18-29-2(m) and 18A-4- 5b. (See footnote 1) As relief, "Grievant seeks back pay for the length of the assignment."

Grievant was denied relief at Level I. On December 15, 1995, a Level II hearing was held, and the grievance was subsequently denied by the grievance evaluator on May 31, 1996. (See footnote 2) Pursuant to W. Va. Code §18-29-4(c), Grievant waived the submission of her grievance to Level III, and the Level II decision was appealed toLevel IV on June 10, 1996. At Level IV, an evidentiary hearing was scheduled for October 16, 1996. However, on October 15, 1996, the undersigned Administrative Law Judge received a fax from Grievant's counsel stating that the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, with the right to file proposed findings of fact and conclusions of law. The case became mature for decision on December 18, 1996, upon receipt of Respondent's fax referred to in footnote number one.

It is noted that during the 1996 legislative session, lawmakers amended W. Va. Code §18A-4-16, effective July 1, 1996. This statute addresses certain particulars with respect to the employment of school personnel for extracurricular assignments. Since Respondent's alleged violations occurred before July 1, 1996, how Grievant's case would have fared under the amendment need not be reached here. “A statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the

statute." Syllabus Pt. 1, State ex rel. Glauser v. Bd. of Educ., 318 S.E.2d 424 (W. Va. 1984); Syllabus Pt. 3, Shanholtz v. Monogahela Power Company, 270 S.E.2d 178 (W. Va. 1980). TheUndersigned finds nothing in the 1996 amendments to W. Va. Code §18A-4-16 to indicate that they were intended to operate retroactively, nor may such an application be inferred from the language of Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant is employed by Respondent as a bus operator. 2. Effective at the end of the 1994-95 school year, all bus operators, including Grievant, were reduced-in-force (RIF'd). However, Respondent decided that, if possible, all drivers would maintain their respective runs the next school year. Tr. 10.

3. On or about September 6, 1995, Respondent posted an early childhood run for the Ridgedale Elementary School (Ridgedale). 4. The Ridgedale run occurred daily, and did not conflict or overlap with Grievant's other scheduled bus runs. Tr. 5 and 6.

5. Grievant bid on the Ridgedale run, and was the most senior applicant. She was offered the Ridgedale run, on the condition that she resign her Riverside Elementary School (Riverside) run.

6. Respondent does not have a written policy limiting a bus operator to only one supplemental bus run. Tr. 8 and 14.

7. Both Jeanie Strader and Mark Myers, bus operators, drove a Kindergarten and a Headstart run in addition to their regular duties during the 1995-1996 school year. Tr. 11-12. 8. If Grievant had been selected for the Ridgedale position, she would have started driving the run on October 18, 1995. Tr. 7 and 8.

POSITION OF THE PARTIES

Grievant asserts that Respondent was required to adhere to the requirements of W. Va. Code §18A-4-8b in selecting a bus operator for the Ridgedale run. Grievant also maintains that Respondent discriminated against her because she was not allowed to add the Ridgedale run to her schedule.

Respondent asserted that it changed its policy to allow only one extra-duty run per bus operator, until all bus operators had an opportunity to have an extra-duty assignment. Respondent asserted that the Code and Grievance Board decisions require extra-duty assignments be offered to its bus operators on a rotational basis. Respondent approached this case as though the Ridgedale run was an extra-duty run.

DISCUSSION

To determine whether Respondent followed the proper hiring procedure required by the Code, or violated W. Va. Code §18A-4-8b, requires a determination of the bus run's classification. W. Va. Code §18A-4-16 [1994] provides, in pertinent part:

> 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.

Extra-duty assignments are defined in W. Va. Code §18A-4-8b as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." (See footnote 3)

The Code does not define regular positions, or additional, mid-day, or supplemental runs. In this case, Respondent labeled the Ridgedale run as an extra-duty run. The Ridgedale run is not extracurricular because it occurs during regularly scheduled working hours. It is not an extra-duty assignment because it occurs daily and is not irregular. Therefore, it is a supplemental or additional run.

W. Va. Code §18A-4-16(5) [1994] provides:

> The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [§18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of employment may beutilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

The Code does not allow a county board of education to adopt an alternative procedure without prior approval from the bus operators. Since the record fails to contain any evidence that an alternative procedure was ever adopted for bus operators, W. Va. Code §18A-4-8b is controlling.

W. Va. Code §18A-4-8b mandates that in filling service personnel positions seniority, qualifications, and evaluation of past service are to be considered by a county board of education. Grievant proved by a preponderance of the evidence that she was qualified for position, and had more seniority than the successful applicant for the Ridgedale run. Grievant's evaluations of past service were never questioned. In fact, the record reveals that Respondent offered the Ridgedale position to Grievant, if she would relinquish her Riverside run.

Since Respondent incorrectly approached this case as though the Ridgedale run was an extra-duty run, instead of a supplemental run, it violated the Code. Therefore, Grievant proved by a preponderance of the evidence that Respondent violated W. Va. Code §18A-4-8b.

Grievant's other allegations do not need to be addressed since it is clear that Respondent did not apply the applicable law to this situation. In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. The Kindergarten and Headstart runs driven by Jeanie Strader and Mark Myers, bus operators, are supplemental runs.

3. The Riverside and Ridgedale Elementary School runs are supplemental runs.

4. Respondent incorrectly used a rotational selection method, outlined in the Code for extra-duty assignments, for a supplemental run, the Ridgedale Elementary School run.

5. Grievant proved by a preponderance of the evidence that Respondent violated W. Va. Code §18A-4-8b by considering factors other than seniority, qualifications, and evaluations of past service.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to compensate Grievant, and to provide her all other benefits, as if she had been awarded and began driving the Ridgedale Elementary School run on October 18, 1995. It is also **ORDERED** that Grievant be instated into the Ridgedale Elementary School run.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Monongalia 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.

DATED:January 31, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

After the case was submitted on the record, Respondent informed by fax the undersigned Administrative Law Judge that it did not oppose Grievant's motion to amend the grievance statement. Grievant's motion to amend was GRANTED.

Footnote: 2

The reason for the lengthy delay is not contained in the record. The Level II decision merely states that the parties mutually agreed on May 31, 1996, as the "response date."

Footnote: 3

W. Va. Code §18A-4-8b further provides, in pertinent part:

> *Notwithstanding any other provisions of this chapter to the contrary, decisions affecting such personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees with that classification category of employment.*