RANDAL P. BROWN,

Grievant,

v. DOCKET NO. 96-49-388

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Randal P. Brown, is employed in a music teacher position with extracurricular duties, by the Upshur County Board of Education (Respondent). Grievant alleges “I believe that Mr. Alan Sturm's insistence that I sign the extra-curricular part of my contract is a violation of my rights as outlined in 18A-4-16 and the Special Services contract itself.” As relief, Grievant seeks to "[m]aintain the regular part of [his] contract and not maintain the extra-curricular contract."

Grievant filed this grievance on or about July 17, 1996. (See footnote 1) At Level I, the grievance was denied on July 22, 1996. On September 5, 1996, Dr. Richard Hoover, Superintendent, denied the grievance at Level II. Pursuant to W. Va. Code §18-29-4(c), Grievant waived a hearing at Level III, and appealed to Level IV on September 17, 1996. At Level IV, 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 October 29, 1996, upon receipt of Grievant's post-hearing submission.

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., 173 W.Va. 481, 318 S.E.2d 424 (1984); Syllabus Pt. 3, Shanholtz v. Monogahela Power Company, 165 W.Va. 305, 270 S.E.2d 178 (1980). The undersigned Administrative Law Judge finds nothing in the 1996 amendments to W. Va. Code

§18A-4-16 to indicate that it was 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 parties submitted a document, entitled JOINT STIPULATION OF FACTS, which is attached hereto as Appendix A, and is incorporated herein as Findings of Fact.

DISCUSSION

The issue presented in this case is whether the duties Grievant performs after regular school hours are an extracurricular assignment, or are part of his regular band teaching position. The West Virginia Supreme Court of Appeals and the Grievance Board have held that regular and extracurricular duties cannot be combined into a single position. In Cruciotti v. McNeel, 183 W.Va. 424, 396 S.E.2d 191 (1990), the unsuccessful applicant for a physical education teacher position brought an action against the school board alleging that the job posting, which described the position as “physical education teacher and athletic trainer” constituted improper joinder of employment positions. The board of education argued that because some of the duties of an athletic trainer took place during the regular school day, it is not a “true extracurricular position.” However, the Court concluded that since most of the duties of the athletic trainer position took place after regularly scheduled hours, the position of athletic trainer was “extracurricular” for purposes of W. Va. Code §18A-4-16.

W. Va. Code §18A-4-16, entitled Extracurricular assignments, provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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.
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.
>
> (3) The terms and conditions of the agreement between the employee and the board of education shall be in writing and signed by both parties.

> (4) An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board.

In analyzing the above Code Section, the Court noted that it was originally enacted in 1981, following the decision in State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980). In syllabus points 2 and 3 of Hawkins, the Court held:

> 2. The assignment of teachers to extracurricular duties is a matter of educational policy within the discretion of the county boards of education.

> 3. The board of education's power to assign extra- curricular duties to teachers is not unlimited and must be exercised in a reasonable manner. Assignments must be nondiscriminatory, related to a teacher's interest and expertise, and must not require excessive hours beyond the contractual workday.

The Court also rejected the board's assertion that the duties of an athletic trainer are not extracurricular because of a local policy stating that "'[a]thletic trainers shall come under the definition of professional educators' as set forth in W. Va. Code, 18-1-1 [1980] and W. Va. Code, 18A-1-1 [1981]." The Court noted:

> We are aware of the purpose of Policy No. 5112, which provides that "the athletic trainer policy is to provide for the professional development of an individual to function as a state certified athletic trainer to improve the health care of student athletes in the public schools of West Virginia."

> This, in our view, is a legitimate purpose. However, contracting the employment of an athletic trainer remains subject to the requirement of W. Va. Code, 18A-4-16 [1982].

The Court then cited Syl. Pt. 1, of Morgan, supra, which states: "School personnel regulations and laws are to be strictly construed in favor of the employee."

The same analysis applies to music teachers and band directors. Their employment for "any activities that occur at times other than regularly scheduled working hours" when they are "instructing, coaching, chaperoning, and escorting" is also regulated by W. Va. Code §18A-4-16.

Decisions by the Grievance Board in the area of extracurricular assignments are clear. In Fox v. Calhoun County Bd. of Educ., Docket No. 07-86-245-1 (Nov. 19, 1986), and Kaplan v. Cabell County Bd. of Educ., Docket No. 89-06-445 (Oct. 22, 1990), the Grievance Board held that W. Va. Code §18A-4-16 prohibits: (1) integrating an extracurricular assignment and a regular- employment position to form one job; (2) posting and advertising a teaching position jointly with an extracurricular position; and (3)
conditioning a teacher's regular contract on the acceptance of extracurricular duties.

In this case, even though the record is sparse, it is clear that Respondent is trying to tie extracurricular duties to a regular teaching position(s). Grievant is being forced to instruct, coach, chaperon, and escort, music/band students to many activities that occur at times other than regularly scheduled working hours, including, but not limited to, summer band, and appearances by the Band at parades, concerts and football games. Therefore, Respondent has undoubtedly violated W. Va. Code §18A-4- 16, since there was no mutual agreement between the parties.

Furthermore, Respondent should not benefit from coercion. Grievant, operating under the long-standing adage of “comply now, grieve later,” signed the special services contract under protest on July 15, 1996. On his contract, Grievant wrote “I am signing this under protest, as I believe that I should not be forced to accept an extra-curricular assignment as part of my regular contract. My signature in no way waives my right to due process.”

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 his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. “School personnel regulations and laws are to be strictly construed in favor of the employee.” Syl. pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. “An extracurricular assignment and a regular-employment position may not be integrated to form one job. See Code §18A-4- 16(4).” Kaplan v. Cabell County Bd. of Educ., Docket No. 89-06-445 (Oct. 22, 1990).

4. “Code §18A-4-16(4) makes it clear that an employee cannot be required to accept extracurricular duties in order to be hired under a regular contract.” Id., p.5.

5. "Code, 18A-4-16(4) prohibits the posting and advertisement of a teaching position jointly with an extracurricular position." Fox v. Calhoun County Bd. of Educ., Docket No. 07-86-245-1 (Nov. 19, 1986).

6. Grievant proved by a preponderance of the evidence that his regular teaching position is conditioned upon acceptance of extracurricular duties.

Accordingly, the grievance is **GRANTED**, and Respondent is to excuse Grievant from the remainder of his duties covered under his "Contract of Employment For Special Services."

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Upshur 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 Respondent's motion to dismiss this grievance because it was not timely filed is DENIED. Grievant signed the "Contract of Employment for Special Services" "under protest" on July 15, 1996. This grievance was filed two days later.