GARY SILVA and JULIA SILVA,

Grievants,

v.

DOCKET NO. 96-03-527

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Gary and Julia Silva, filed the following grievance on September 3, 1996:

> Grievants contend that Respondent posted extracurricular assignments to which they were entitled to reinstatemen(t). Grievants allege a violation of West Virginia Code §§18A-4-8b, 18A-2-7, 18A-2-6 and 18A-4- 16. Grievants seek reinstatement to the positions and with back pay and other benefits retroactive to the beginning of the 1996-97 school year.

Following adverse decisions at the lower levels, Grievants advanced their appeal to level four on December 10, 1996. (See footnote 1) Hearing was held on February 20, 1997, and this case became mature for decision on April 15, 1997, the deadline for the submission of proposed findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

Grievant's Exhibits

LII1. Boone County Board of Education Notice of Vacancies, Posting Number 16 96-97.

LII2. Boone County Board of Education Notice of Vacancies, Posting Number 30 96-97.

LII3.

March 12, 1997 letter from Gary D. Sumpter, Superintendent of Schools, to Julia Silva.

LII4.

March 28, 1997 letter from Gary D. Sumpter, Superintendent of Schools, to Julia Silva.

Board Exhibits

LII1.

Gary Silva's Application for School Bus Operator for posting number 16 96-97.

LII2.

Boone County Schools Contract for Extra Duty Assignment, Extra-Duty School Bus Run School Year 1995-96, dated September 25, 1995, signed by Julia Silva.

LII3.

Julia Silva's Application for School Bus Operator for posting number 16 96-97.

LII4.

Boone County Schools Contract for Extra Duty Assignment, Extra-Duty School Bus Run School Year 1995-96, dated September 29, 1995, signed by Gary Silva.

LIV1.

Boone County Board of Education Notice of Vacancies Posting Number 24 95-96.

LIV2.

March 12, 1996 letter from Gary D. Sumpter, Superintendent of Schools, to Gary Silva.

Testimony

Grievants testified in their own behalf. The Board offered the testimony of Joseph Tagliente.

ISSUE

The issue is whether the Board violated W. Va. Code §§ 18A-2-6, 18A-2-7, 18A-4- 8b, and 18A-4-16, when it terminated Grievants' extracurricular bus runs in the Spring of 1996, and reposted the extracurricular bus runs in August 1996.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Mr. and Mrs. Silva, husband and wife, are regularly employed by the Board as school bus operators. 2. In August 1995, Mr. Silva applied for an extracurricular vocational run as a result of a posting. Job 2 on that posting was described as follows:

> Vocational Run - Leave Scott at approximately 7:30 a.m.; Leave Boone Career Center at approximately 9:06 a.m.
>
> *(This is second bus needed at this time frame).

Board Ex. LIV1.

3. Mr. Silva received the second part of the run identified in "Job 2," which required him to pick up students at Boone Career Center and deliver them back to Scott High School. Larry Ballard drove the first part of the run described in Job 2 in 1995-96.

4. Mr. Silva signed an extracurricular contract for this assignment. The contract specified that the assignment was for the 1995-96 school year only, and paid $5.50 per run. Board Ex. LII4.

5. In August 1995, Mrs. Silva applied for two extracurricular runs as a result of a posting. Mrs. Silva received the runs identified as "Job 4" and "Job 6." Board Ex. LIV1. 6. Job 4 is described as follows:

> Vocational Run - Leave Scott at approximately 9:06 a.m.; Leave Boone Career Center at 10:47 a.m.

Job 6 is described as follows:

> Vocational Run - Leave Scott at approximately 11:27 a.m.; Leave Boone Career Center at 2:27 p.m.

7. Mrs. Silva signed an extracurricular contract for these assignments. The contract specified that the assignments were for the 1995-96 school year only, and paid $5.50 per run. Board Ex. LII2.

8. The number and timing of bus runs to the vocational school is dependent upon scheduling of classes at the local high schools and at the vocational school, and the number of students who sign

up for vocational classes.

9. The Board's usual practice is to terminate all extracurricular vocational contracts at the end of each school year, and once it determines the number of students signed up for vocational school, to repost those runs in August of each year,

10. The vocational runs are awarded based upon seniority.

11. Mr. and Mrs. Silva received telephone calls from Joseph Tagliente, Assistant Superintendent for Transportation, in the Spring of 1996. He informed them their extracurricular runs were going to be terminated, and that they would receive letters to that effect.

12. Mr. and Mrs. Silva received identical notices dated March 12, 1996, that the Board was to consider the termination of their supplemental vocational runs. The letter stated, “[t]his would include the runs made at 9:15 a.m. and 10:48 a.m. Insofar as your present contract of employment includes supplemental pay for such vocational run, consideration will be given to termination of that contract and offering instead a contract that does not provide pay for the vocational run.” G. Ex. LII3, R Ex. LIV2.

13. These letters are form letters which were clearly issued in error to both Grievants without changing the description of the vocational runs affected by each letter.

14. The description in the March 12, 1996 letter did not correspond with Mr. Silva's extracurricular contract. Nevertheless, there is no dispute that Mr. Silva was aware at that time that his extracurricular contract was going to be terminated in the Spring of 1996. 15. The description in the March 12, 1996 letter did correspond with Mrs. Silva's Job 4. After receiving this letter, she telephoned Mr. Tagliente, and he advised her that all of her runs were going to be terminated. J. Silva, LIV Testimony.

16. Mr. and Mrs. Silva received sufficient notice in the Spring of 1996 that their extracurricular contracts were going to be terminated.

17. Mr. and Mrs. Silva received notices dated March 28, 1996, that the Board had voted to terminate their “contract[s] for supplemental assignment vocational run. . . at the end of the 1995-96 school term.” G. Ex. LII4.

18. Mr. and Mrs. Silva talked to Mr. Tagliente during the Summer of 1996 about when the vocational runs for the 1996-97 school year would be posted. They were going on vacation and wanted to be sure they received the postings so they could apply for the vacancies. J. Silva, LIV

Testimony.

19. In August 1996, the Board posted a notice of vacancies for several vocational runs for school year 1996-97 only. Included on this list were runs identified as Job 2, Job 4, and Job 5, which Mr. and Mrs. Silva identified as their former extracurricular assignments. G. Ex. LII1.

20. Mr. Silva applied for Job 2 in August 1996, but the position was awarded to Charles Gillispie, a more senior bus operator. Shortly thereafter, Mr. Gillispie relinquished this assignment because the first segment of it conflicted with his regular run, and it was posted again.

21. The assignment was subsequently awarded to Larry Ballard and Charles Gillispie. Mr. Ballard received the segment transporting students from the high school to the Career Center, the same segment he had in 1995-96. Mr. Gillispie received thesegment transporting students from the Career Center to the high school, which was the segment run by Mr. Silva in 1995-96.

22. Mrs. Silva applied for Jobs 4 and 5 on August 8, 1996, but the positions were awarded to Rose Ann Cook, a more senior bus operator employed by the Board, on August 21, 1996.

23. During the 1995-96 school year, three other regularly employed bus operators held vocational assignments which the Board did not terminate at the end of the 1995-96 school year.

24. The drivers identified in Finding of Fact No. 23 had regular curricular runs in the afternoon, but drove the vocational runs in the morning. They did not have regular morning runs. Thus, the morning vocational runs were considered part of their regular contract of employment.

DISCUSSION

Grievants first allege the Board violated their extracurricular contracts under W. Va. Code § 18A-4-16, when it terminated them in the Spring of 1996, relying on this Grievance Board's decision in Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). In Lambert, the county board did not terminate the extracurricular contracts held by its employees at the end of each year, but rather, treated them as continuing contracts which were automatically renewed. The grievants, who sought an opportunity to bid on extracurricular contracts, alleged the board was required to vacate and post extracurricular contracts each year. The Administrative Law Judge held that a board is not required to vacate and post extracurricular contracts each year. Once an employee received an extracurricular contract, it was essentially “permanently” his. Thus, Grievantshere allege that once they received their extracurricular contracts, they were permanently

theirs, and it was error for the Board to terminate them.

While a board may not be required to vacate extracurricular contracts each year, there is nothing in Lambert, or any other Grievance Board precedent, which supports Grievants' contention that a board is prevented from doing so. The only restriction placed on a board when terminating extracurricular contracts is compliance with the procedural notice requirements of Code §§ 18A-2-6 and 18A-2-7.

Grievants also rely on W. Va. Code § 18A-4-8b to support their position that they are entitled to hold their extracurricular contracts permanently, specifically the provision which states:

> The county board may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter.

They apparently reason that this sentence, which was included in a 1983 amendment to the statute, was intended to preserve the status quo and to make it clear that county boards of education were not required to post all service positions once the amendment became effective. Grievants apparently argue that the words “and thereafter” should be interpreted to mean that jobs filled after 1983 cannot be posted unless a vacancy exists.

Grievants' interpretation of the previously-quoted sentence is untenable and their argument has previously been addressed by this Grievance Board. It is true that this sentence was designed to preserve the status quo by ensuring that a service employee who “held” a position prior to the amendment could remain in that position “thereafter.” It reflects a legislative intent that the amendment was to operate prospectively only, so as not to require wholesale reshuffling of all service positions because of a change in the jobselection laws. It has no application to jobs filled after the effective date of the amendment. See Lucas, et al. v. Lincoln County Bd. of Educ., Docket No. 90-22-419 (May 20, 1991); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989). Furthermore, this sentence is contained within the statutory selection procedure for regularly employed school service personnel. There is nothing within Code §§ 18A-4-8b or 18A-4-16 which would justify extending such a provision to extracurricular contracts held by school service personnel.

Grievant Julia Silva also alleges the Board violated her procedural notice rights in the Spring of 1996, because she did not get sufficient notice that one of her two vocational runs was being terminated. W. Va. Code § 18A-2-6 provides that:

> The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of then current year, . . .

and W. Va. Code § 18A-2-7, provides that:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, . . .

This Grievance Board has held that both of the above statutory provisions apply to extracurricular contracts issued pursuant to W. Va. Code § 18A-4-16 (1996). (See footnote 2) Smith v.Board of Educ. of County of Logan, 341 S.E.2d 685 (W. Va. 1985); Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993); Black v. Cabell County Bd. of Educ., Docket No. 92-06-114 (June 22, 1992). In Smith, the Court "likened the extracurricular assignment to regular employment and held that a county board of education, if it intended to alter an extracurricular assignment, had to abide by the same procedural strictures applicable to regular contracts. . . ." Lambert, supra.

The Smith Court held that an extracurricular contract, even if its term was for one year only, could not be allowed to expire without notice to the affected employee. Failure to give notice would result in the automatic reassignment to the same position for the following year under the same terms and conditions of the current contract. Smith, 341 S.E.2d at 690 (W. Va. 1985). Mrs. Silva claims she did not get notice that one of her two vocational runs was going to be terminated, and therefore, she should at least be reinstated to that run, with applicable back pay.

At the end of the 1995-96 school year, the Board adhered to its usual practice and notified all employees with vocational runs, including Grievants, that their runs were going to be terminated. There is no dispute that Mr. Silva received notice that his extracurricular contract was going to be terminated by the Board in the Spring of 1996. Mrs. Silva, however, contends she was not put on notice that the vocational run described in her contract as "11:27 Scott to Career Center/leave Center to Scott at 2:27 p.m." was being considered for elimination. Both of Mrs. Silva's vocational runs were

included and described in her extracurricular contract of employment.

I find that the notice of transfer and termination of the vocational runs contract which was given to Mrs. Silva was sufficient to put her on notice that termination of all of hervocational runs was being considered. The letter to Mrs. Silva states that the Board was considering the "termination of your supplemental vocational runs." (Emphasis added). While the letter went on to "include" runs made at 9:15 a.m. and 10:48 a.m., by using the word "include" Grievant was put on notice that those two runs were grouped together with her other runs. Furthermore, the letter advises Mrs. Silva that

> Insofar as your present contract of employment includes supplemental pay for such vocational run, consideration will be given to termination of that contract and offering instead a contract that does not provide pay for the vocational run. If the Board so acts, your position will be transferred from a position requiring a vocational run and providing pay for such run, to a position that neither involves a vocational run nor provides supplemental pay for such run. (Emphasis added)

G. Ex. LII3.

By the inclusion of this language, Mrs. Silva was at least put on inquiry notice that consideration was being given to terminate her contract, which included all of her runs.

Both Grievants testified they were aware that all vocational bus runs were terminated on an annual basis and jobs were re-posted in the fall. Nevertheless, Mrs. Silva testified she made no inquiry as to whether all her runs were being terminated after she received the March 12, 1996 letter. Both Grievants discussed this matter with Mr. Tagliente on various occasions in the Summer of 1996. In fact, Mrs. Silva had been through this process the year before when she had her previous extracurricular contract terminated and re-bid. For these reasons, I agree with the Level II grievance evaluator, and conclude that Mrs. Silva was being disingenuous when she testified she did not consider from the contents of the letter of March 12, 1996, that all her runs were being considered for termination. Accordingly, I find that Mrs. Silva was given sufficient notice in the Spring of 1996 of the termination of all her vocational runs. Grievants also allege the stated justification for the termination of their extracurricular contracts, lack of need, ceased to exist because the same runs were posted at the beginning of the 1996-97 school year. Grievants allege the Board knew they would need the same runs prior to June 30, 1996, and relying on prior Grievance Board decisions, contend their terminations should have been rescinded. There is no language in the applicable statutes which mandates that a transfer, or in this case, termination of contract, be rescinded when

the justification for the action ceases to exist prior to the end of the school term. Nevertheless, this Grievance Board has addressed this issue with regard to professional employees, and has held that county boards of education must rescind reductions-in-force and transfers when the justification for them no longer exists prior to June 30, the end of the school year. Barberio v. Harrison County Bd. of Educ., Docket No. 89-17-351 (Feb. 13, 1990); see also Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Clay v. Mingo County Bd. of Educ., Docket No. 94- 29-516 (Dec. 29, 1994); Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991); Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990). This protection was extended to service personnel in Conner v. Kanawha County Bd. of Educ., Docket No. 92-20-204A (Sept. 23, 1992); see also Hixenbaugh v. Monongalia County Bd. of Educ., Docket No. 92-32-353 (Mar. 30, 1993); notwithstanding the fact that the applicable reduction-in-force and transfer statutes contain no language which governs this situation. See W. Va. Code §§ 18A-4-8b and 18A-2-7.

Grievants allege the Board develops a preliminary schedule in the Spring of each year in an to attempt predict staffing and curriculum needs for the upcoming school year. Thus, Grievants allege, the Board must have known before June 30, 1996, what its needswere going to be with regard to vocational runs for the next school year. The Board argues that it does not know how many students will be enrolled in vocational courses until shortly before the beginning of the instructional term, which is why it does not post vocational runs until August.

The number and timing of bus runs to the vocational school is dependent upon scheduling of classes at the local high schools and at the vocational school, and the number of students who sign up for vocational classes. This scheduling information is not available to the administration until at least August of each year. Accordingly, for a number of years the Board has followed the annual practice of advising all holders of contracts for extracurricular vocational runs that their contracts would be terminated for the upcoming year and their positions would be transferred from a position of an employee with a contract for a vocational run to an employee with a contract without a vocational run.

When the number and schedule for bus runs is determined in August, then the Board posts the vocational run positions and employees are permitted to bid. The runs are awarded based on seniority. The only exception to this procedure is for three bus drivers who do not have both an regular elementary and a secondary run. Rather than an elementary run, these employees have, as

part of their regular duties, been granted a vocational run. Consequently, these employees do not have contracts for vocational runs, and that part of their regular run is not terminated and posted each year.

The reasons for the Grievants' transfer did not disappear until August of 1996, and the Board did not abuse its discretion in failing to rescind the transfers. When the reason for transfer goes away after July 1, and a county board decides not to offer reinstatement, such a decision will not be considered an abuse of discretion absent extremely compellingcause. See Lucas v. Lincoln County Board of Educ., Docket No. 90-22-419 (May 20, 1991). It must be noted that this Grievance Board's so-called “justification” case law has not yet been extended to apply to extracurricular contracts entered into under W. Va. Code § 18A-4-16. Because the justification for the termination of Grievants' extracurricular contracts did not cease to exist prior to June 30, 1996, it is not necessary to decide at this time whether that body of law should be extended to extracurricular contracts.

Finally, Grievants also allege a violation of W. Va. Code § 18A-4-16, which governs extracurricular assignments. That Section provides that (1) extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative; (2) the employee and superintendent shall mutually agree upon the number of hours of the assignment; (3) the terms and conditions of the assignment shall be in writing; (4) the employee's regular contract of employment shall not be conditioned upon the employee's acceptance or continuation of an extracurricular assignment; and (5) extracurricular assignments shall be filled in accordance with W. Va. Code § 18A-4-8b, unless an alternative procedure is approved by mutual agreement of the board and two thirds of the employees within a particular classification of employment.

Grievants and the Board agreed upon the extracurricular assignments, the terms of which were in writing. No evidence was presented that Grievants' regular contracts of employment were conditioned upon their acceptance or continuation of the extracurricular assignments. Grievants obtained their vocational assignments under the requirements of Code § 18A-4-8b, and the Board posted and filled the assignments after Grievants were relieved of them in the same manner. There is no evidence that the Board violated this Code Section; therefore, that claim is denied.

CONCLUSIONS OF LAW

1. A board of education is not required to vacate and repost extracurricular assignments on an annual basis. Lambert, et al. v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991).

2. A board of education is not prevented from vacating and reposting extracurricular assignments on an annual basis, as long as it adheres to the notice provisions of W. Va. Code §§ 18A-2-6 and/or 18A-2-7.

3. In order to terminate the extracurricular assignment held by an employee, a county board of education must comply with the procedural requirements of W. Va. Code §§ 18A-2-6 and/or 18A-2-7. Smith v. Bd. of Educ. of County of Logan, 341 S.E.2d 685 (W. Va. 1985). Grievants have failed to prove by a preponderance of the evidence that the Board did not comply with the notice provisions set forth above in terminating their extracurricular contracts in the Spring of 1996.

4. Grievants have failed to prove by a preponderance of the evidence any violations of W. Va. Code §§ 18A-4-8b or 18A-4-16.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: July 3, 1997

Footnote: 1

The level two transcript is incorporated into the record and is referenced as "Tr., p. ___". Exhibits are referenced as "G. or Board Ex. LII_ or LIV _," indicating their introduction at level two or level four.

Footnote: 2

Refusal to renew an extracurricular contract is considered a transfer. Smith v. Board of Educ. of County of Logan,

341 S.E.2d 685, 689.