GARY SHOULDIS,

Grievant,

v. **Docket No. 99-18-274**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On May 20, 1999, Gary Shouldis (Grievant) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Jackson County Board of Education (JCBE) effectively terminated his extracurricular contract as a Bus Operator without following proper statutory procedures. On May 24, 1999, the grievance was denied by Grievant's immediate supervisor, Jack Farra. Grievant appealed to Level II where an evidentiary hearing was conducted on June 8, 1999. On June 25, 1999, JCBE Superintendent Dale Summitt issued a written decision denying the grievance at Level II. Grievant then appealed to Level III where JCBE, at a meeting on July 8, 1999, considered the matter on the basis of the record developed at Level II. On July 9, 1999, Grievant was notified that the board voted to deny his grievance, and Grievant appealed to Level IV on July 15, 1999. On September 21, 1999, a Level IV hearing was conducted in thisGrievance Board's office in Charleston, West Virginia. (See footnote 1) At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on October 25, 1999, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Jackson County Board of Education (JCBE) as a

regular Bus Operator, a school service personnel position.

2. Grievant was first awarded an extracurricular contract to transport students from Ripley High School to the Roane-Jackson Technical Center and back for the 1993-94 school year. Grievant held this assignment through the 1994-95 school year.

3. By correspondence dated April 3, 1995, Grievant was advised that his extracurricular contract would be terminated at the end of the 1994-95 school year, as there was no need for his services during the 1995-96 school year.

4. On August 26, 1996, Grievant was rehired to transport students between Ripley High School and the Roane-Jackson Technical Center for the 1996-97 school year. This employment was renewed for the 1997-98 and 1998-99 school years.

5. Grievant's contract for the 1998-99 school year contained the following terms:

> 1. The period of this assignment shall be for the 1998-99 school year only.
>
> 2. This contract shall terminate at the end of the designated school year or may be terminated at any time for just cause pursuant to the West Virginia Code 18A-2-8 or by mutual consent of the parties.
>
> 3. The parties to this contract hereby acknowledge that this assignment agreement is entered into pursuant to the West Virginia [C]ode 18A-4-16.

6. Further, under the heading of "Compensation and/or Other Consideration," the contract provided "$25 per day as needed."

7. Up until April 27, 1999, two buses were operated to transport students in the afternoon. On that date, Grievant was advised that he would no longer be needed to transport students. JCBE determined that one bus was adequate to carry all students requiring transportation for the remainder of the school year, and the more senior Bus Operator would be permitted to continue with that run. L III HT at 15.

8. Grievant continued to work on an "as needed" basis during the remainder of the 1998-99 school year whenever an extracurricular Bus Operator was absent.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. This grievance involves an extracurricular assignment subject to W. Va. Code § 18A-4-16 which provides:

> (1) The assignment of teachers and service personnel to extracur ricular 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.
>
> (5) The board of education shall fill extracurricular and supplemental 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 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 within that classification category of employment.

It is well established that county boards of education must utilize the notice and hearing procedures of W. Va. Code §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental

assignment under W. Va. Code § 18A-4-16, unless the assignmentexpires 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); Toney v. Lincoln County Bd. of Educ., Docket No. 97-22-020 (July 7, 1997); Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); 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). See Garvin v. Webster County Bd. of Educ., Docket No. 92-51-407 (Jan. 7, 1993); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). It is not disputed that Grievant held an extracurricular contract as a Bus Operator assigned to the “Roane-Jackson Technical Center Bus Run” for the 1998-99 school year. Ex 2 at L II. Instead, this dispute centers upon whether JCBE was required to follow the proper statutory procedures to terminate Grievant's contract, rather than simply directing him to stop transporting students due to a lack of need for his services.

JCBE contends that its actions were taken properly in accordance with this Grievance Board's decision in Ramey v. Lincoln County Board of Education, supra. In Ramey, the grievant was a bus operator who held a "supplemental" (extracurricular) (See footnote 2) contract to transport a single handicapped student to and from school on a daily basis for the "1992/93 school year or as long as required by IEP." (See footnote 3) After the beginning of the school year, the student's health deteriorated to the point where he could no longer betransported to school by bus. Ramey held that once the IEP was changed to eliminate the requirement for bus transportation, the grievant's extracurricular contract ended in accordance with its terms.

JCBE contends that the same result is appropriate here because of the language in Grievant's contract which calls for him to transport students on the vocational bus run for the 1998-99 school year “as needed.” Ex 2 at L II. Thus, the ultimate issue to be resolved is whether Grievant had a reasonable expectation to continue driving an extracurricular bus run when the number of students requiring transportation between Ripley High School and the Roane-Jackson Technical Center in the afternoon declined to a point where their transportation requirements could be met by only one Bus Operator, rather than two.

Grievant does not dispute that he is not “needed” and, therefore, not entitled to compensation for weekends, school holidays, inclement weather days, and other days when the schools are not open, and there are no students requiring transportation. Indeed, Grievant contends that these are the only

reasons he should not be paid to provide transportation, according to his understanding of the contract's language.

In Ramey, the extracurricular assignment at issue involved transportation of a single child. Once that child's IEP changed to delete the requirement for special transportation, a specific event had occurred which operated to terminate the contract by its own terms. In the instant matter, the term “as needed” is less specific than the language applied in Ramey. Nonetheless, this language did not appear in the extracurricular contracts issued to Grievant for the 1993-94 (J Ex 1 at L IV) and 1994-95 (J Ex 2 at L IV) school years, butwas added to Grievant's extracurricular contract for the 1996-97 (J Ex 3 at L IV) and subsequent school years. J Ex 4 at L IV; Ex 2 at L II. This language was apparently inserted by JCBE because it had multiple drivers driving the vocational runs, while the number of students requiring transportation tends to fluctuate, as students move in and out of the area, or provide their own transportation between school facilities. In any event, the “as needed” language makes this grievance different from situations where the extracurricular contract makes no reference to a subsequent event or situation. See Payne, supra; Doss, supra.

Contrary to Grievant's argument, it does not appear that the term “as needed” was added to the extracurricular contract to prevent payment of wages on snow days, holidays and other days when school is not in session, because there is no evidence that, prior to the insertion of such language, Bus Operators holding extracurricular assignments with JCBE were compensated for days they did not work. Accordingly, despite the fact that “as needed” does not represent an objective event or condition which can be established as readily as the situation in Ramey, the undersigned is persuaded that JCBE established the transportation needs of its students could be met by operating only one bus for the afternoon run at issue, and, consistent with the “as needed” language in Grievant's extracurricular contract, it was not arbitrary and capricious to discontinue Grievant's extracurricular bus run on days when his services were not required.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. 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).

3. An extracurricular assignment may terminate in accordance with its own terms. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

4. Respondent properly directed Grievant to cease operating his afternoon extracurricular bus run when the number of students requiring transportation declined to a point where their transportation needs could be accommodated by one bus, rather than the two buses which had operated up until that point in the 1998-99 school year. This action was reasonably consistent with the “as needed” clause contained in the compensation section of Grievant's contract, and was not otherwise arbitrary and capricious under the circumstances presented. See Bowman v. Marion County Bd. of Educ., Docket No. 96-24-261 (Apr. 29, 1997); Ramey, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 18, 1999

Footnote: 1

Grievant was represented by counsel, John Roush, of the West Virginia School Service Personnel Association. Respondent was also represented by counsel, Gregory Bailey, with Bowles Rice McDavid Graff & Love.

Footnote: 2

As noted in Eastham v. Cabell County Board of Education, Docket No. 92-06-397 (Apr. 16, 1993), the terms "extracurricular" and "supplemental" are often used interchangeably, albeit sometimes erroneously. Effective July 1, 1996, W. Va. Code § 18A-4-16(5) was amended to eliminate the reference to "supplemental" assignments. Such assignments are now either "extracurricular" or "extra duty."

Footnote: 3

An "IEP" is an Individual Education Plan mandated for special education students.