RALPH ROBINSON, et al.,

Grievants,

v. **Docket No. 01-46-332**

TAYLOR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ralph Robinson, John Simpson, Lois Nose, and Alfred Gibson ("Grievants"), employed by Respondent as bus operators, initiated this proceeding on December 14, 2000, challenging the compensation they receive for midday extracurricular bus runs. After the grievance was denied at level one, a level two hearing was held on April 5, 2001. The grievance was subsequently denied in a written level two decision dated May 3, 2001. Level three consideration was waived, and Grievants appealed to level four on May 10, 2001. A hearing was held in the Grievance Board's office in Westover, West Virginia, on September 24, 2001. Grievants were represented by counsel, John E. Roush, and Respondent was also represented by counsel, Basil R. Legg. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 15, 2001.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by Respondent as bus operators. In addition to their regular assignments, each grievant made a mid-day extracurricular bus run during the2000-2001 school year. Grievants Robinson and Gibson made two extracurricular runs each day.

2. Until 2000, Respondent did not post extracurricular bus runs, nor did it issue contracts to the employees who were awarded the runs.

3. Prior to the 2000-2001 school year, bus operators who drove extracurricular runs were paid on a per day basis for a 200-day contract term. Therefore, during the 1999- 2000 school year, drivers

received $9 per day for each run for 200 days, whether or not they drove the run every day.

4. Jane Reynolds became Superintendent of the Taylor County Board of Education on July 1, 2000.

5. Upon discovering that bus operators were paid every day under a 200-day contract term for mid-day runs, Superintendent Reynolds began discussions with the drivers and Richard Teagarden, Transportation Director, to come up with a system of fair compensation with regard to extracurricular runs. Superintendent Reynolds believed that the failure to post the runs was illegal, and she also believed that it was unfair to compensate all drivers the same amount, when some drivers drive their mid-day runs only two or three days a week, whereas others drive five days per week. In addition, most of these runs are only during the regular, 180-day school year, so compensation for 200 days did not seem appropriate.

6. During preliminary discussions regarding this matter, Mr. Teagarden proposed to the drivers that they would be paid $15 per run for 180 days, regardless ofwhether or not the run was driven on a particular day. (See footnote 1) This was not the proposal which was finally approved by the superintendent and board.

7. Prior to conclusion of the discussions regarding the appropriate pay for mid- day runs, in late August of 2000, Mr. Teagarden informed Connie Rogucki of the payroll office that mid-day bus runs would be compensated at a rate of $15 per run for 180 days.

8. Based upon Mr. Teagarden's communications to the payroll office, Grievants were compensated $15 per run, 5 days per week, whether or not they made their mid-day runs every day, for the months of September and October, 2000.

9. In early November, 2000, Superintendent Reynolds presented Grievants with contracts for their extracurricular runs for the 2000-2001 school year. These contracts provided for payment of $15 per run for each run actually driven.

10. Because Grievants had received compensation for their runs at the higher rate for the first two months of the school year, Grievants did not wish to sign the contracts. Accordingly, Grievants Robinson, Simpson and Nose signed the contracts, but attached the following statement:

> Upon advice from counsel I am returning this contract signed and dated by the required date. My signature in no way reflects my intentions of accepting the terms of this contract. My signature on this contract is only to meet the requirement of retaining my position as a mid-day bus operator of which might prevent any further conflict at a later date.

Grievant Gibson did not attach a similar document to his signed contract. (See footnote 2)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

West Virginia Code § 18A-4-16 governs extracurricular assignments and provides, in pertinent part:

> (1) The assignment of . . . 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. . . .
>
> (2) The employee and the superintendent . . ., 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 shall be in writing and signed by both parties.**

(Emphasis added.)

Grievants contend that, pursuant to this Grievance Board's prior ruling in Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996), Respondent was required to provide them with the opportunity for notice and hearing, pursuant to W. Va. Code § 18A-2-7, prior to “terminating” their extracurricular “contracts.” However, Grievants fail to note that the situation in Doss differed from the instant case in that the grievant in that case had not been issued a contract for his extracurricular assignment for several years in a row, and his assignment was terminated during the fall semester with no writtencontract. As stated in Doss, it is the school board's responsibility to issue properly worded contracts to its employees, and the employee cannot be held responsible for the board's

failure "to correct and clarify his situation with appropriate contract language." See W. Va. Code § 18A-2-5.

Conversely, in the instant case, Respondent did as it was required by statute by placing the agreement in written contract form after completing negotiations with Grievants. Although Grievants dispute that they ever agreed to be paid $15 per run only as each run was actually driven, their misunderstanding of the superintendent's "offer" does not entitle them to the benefits of that misunderstanding. One cannot blame Grievants for feeling entitlement to the higher rate of pay after having received that compensation for two months, pursuant to Mr. Teagarden's unauthorized representation to the payroll office. However, Mr. Teagarden acknowledged that he had no authority from either the superintendent or the board to make such a representation, and he admittedly misunderstood the superintendent's proposal. As stated in Cook v. Mason County Board of Education, Docket No. 96-26-105 (Aug. 19, 1996), such unauthorized representations are not enforceable, even if made by the superintendent:

> [T]he Superintendent's act of entering into a written agreement with [grievant] which provided additional compensation, without Board approval, constitutes an ultra vires act, which the Board is not bound to follow. A contract of employment between a county board of education and a service employee, whether regular full-time or extracurricular, can be made only with the board's approval. See W. Va. Code 18A-2-5 and 18A-4-16. A superintendent's recommendation or approval, in and of itself, will not suffice. See W. Va. Code 18-4-10(2). . . .
>
> Ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates functioning in their governmental capacity, and such ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); see also Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994). Thus, ultra vires acts are not enforceable[.]

See also Perkins v. Mingo County Bd. of Educ., Docket No. 97-29-470 (July 21, 1998).

Accordingly, Mr. Teagarden's representations and the payments made to Grievants pursuant to them, do not amount to a valid, enforceable extracurricular contract. Moreover, there was no "termination" of the alleged contract at all. The contracts which were presented to Grievants in November embodied the superintendent's, and the board's, intentions regarding these assignments. If these contracts did not embody the "mutual agreement" of the parties, as required by W. Va. Code

§ 18A-4-16, Grievants could have refused to sign the contracts and filed a grievance. However, Grievants chose to sign the contracts, attaching a statement purporting not to accept the terms of those contracts. Nevertheless, Grievants have, in fact, accepted and benefitted from the terms of their contracts by driving the runs and being paid according to the contract terms. Grievants have failed to show that the written contracts were modified, and, by their conduct, have accepted their terms. Therefore, they are entitled to no relief in this grievance.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Extracurricular assignments "shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval" and "[t]he terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties." W. Va. Code § 18A-4-16.

3. A supervisor's act of entering into an agreement with an employee without approval by the board of education constitutes an ultra vires act, and the board of education is not bound by such a contract. Ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); see also Perkins v. Mingo County Bd. of Educ., Docket No. 97-29-470 (July 21, 1998); Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

4. Grievants did not have a valid, enforceable contract for their extracurricular bus runs until November of 2000, and, accordingly, possessed no property interest in those assignments prior to the execution of those contracts.

5. As of November 9, 2000, Grievants executed extracurricular contracts approved by Respondent and were bound by the terms of those contracts.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Taylor 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 andState 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.

Date: October 29, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants Gibson and Robinson were and are currently paid the $15 "per day" rate for each run they make, resulting in a $30 per day payment.

Footnote: 2

Although Grievant Gibson testified that he completed such a document, separate from his contract, it could not be found and was not offered into evidence.