KAREN ALIFF and MARY ESPINOSA,

Grievants,

v. Docket No. 03-19-319

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondents.

DECISION

Karen Aliff and Mary Espinosa ("Grievants") initiated this proceeding on May 7, 2003, protesting the alteration of the terms of their extracurricular assignments. They seek as relief to receive the same compensation for the runs as they have received in past school years. The record does not reflect what proceedings occurred at level one. A level two hearing was conducted on August 11, 2003, and the grievance was denied on October 6, 2003. Level three consideration was bypassed, and Grievants appealed to level four on October 14, 2003. A hearing was held in Westover, West Virginia, on April 2, 2004, where Grievants were represented by John E. Roush, counsel for the School Service Personnel Association, and Respondent was represented by its counsel, David A. Camilletti. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 4, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants have been regularly employed by Respondent as bus operators for numerous years. 2. Since 1992, Grievant Espinosa has driven a mid-day bus run, for which she has received extracurricular compensation. Although the run is not exactly the same every year, it always involves either transportation of students from one school to another to take advanced classes, or it requires Grievant to transport behavioral disorder ("BD") students, who do not attend school for the full school day.

3. Since 1999, Grievant Aliff has also driven a mid-day bus run, and she has received extracurricular compensation for it. Her mid-day run requires her to transport preschool students home from TA Lowery Elementary School.

4. Also since 1999, Grievant Aliff has been required to pick up students at the Alternative Learning Center ("ALC") at approximately 2:00 p.m. and transport them to the high school, where she drops off the ALC students and waits for students to board for her regular afternoon run. This was posted as an extracurricular assignment, and Grievant was paid accordingly.

5. By correspondence dated May 17, 2003, Grievants were notified that it was "uncertain" whether their mid-day runs would be needed for the 2003-2004 school year. Grievant were given the opportunity to protest this action at a board hearing, at which time it had still not been determined whether or not the runs would be needed for the upcoming school year.

6. Grievants' mid-day runs were needed for the 2003-2004 school year, and they were assigned to Grievants with two alterations. Rather than receiving compensation for their mid-day runs whether they drove them or not, Grievants are now paid on an "as needed" basis, so they do not get paid for snow days and other days off. Additionally,Grievant Aliff now receives no compensation for the ALC run, and it is considered part of her regular afternoon run.

7. Grievants' extracurricular runs did not change in any respect in 2003-2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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. Grievants contend that they are entitled to their extracurricular assignments under the same terms and conditions which applied during the 2002-2003 school year, entitling them to compensation for the runs whether they are needed or not on any given day. Also, Grievant Aliff argues that Respondent did not have the authority to suddenly incorporate her ALC extracurricular run into her regular afternoon run, depriving her of the extra compensation she has received for that run for several years.

Grievants point to two statutes which are pivotal to the outcome of this case. West Virginia Code

§ 18A-4-16(6) provides, in pertinent part:

> An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination.

Respondent does not dispute that Grievants' assignments did not change between the 2002-2003 and 2003-2004 school year, entitling them to the assignments in the fall of 2003 pursuant to the provisions of the statute, and contends that it has done nothing improper. However, as Grievants have argued, the question remains as to whether Respondent had the authority to reinstitute the same assignments, but with altered compensation conditions.

Grievants contend that the provisions of the so-called “non-relegation clause” of W. Va. Code § 18A-4-8(m), as interpreted by the West Virginia Supreme Court of Appeals, specifically prohibit Respondent's actions. That statute provides, in pertinent part:

> No service employee, without his or her written consent, may be reclassified by class title, nor may a service employee, without his or her written consent, be relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his or her salary, rate of pay, compensation or benefits for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

As Grievants have duly noted, in Crock v. Harrison County Bd. of Educ., 211 W. Va. 40, 560 S.E.2d 515 (2002), the Supreme Court held that the non-relegation clause prohibits a board of education from terminating an employee's contract and reissuing it with altered compensation. In that case, the board had attempted to reissue the grievants' contracts without the previously granted credit for prior experience which had been incorporated into grievants' salaries. The Court noted that, since there were no changes in the employees' employment terms or the positions they held, taking this action merely to alter their salaries was clearly prohibited by the statute. Such is the case here. As stated above, Respondent does not deny that Grievants are currently performing the identical extracurricular assignments they have held for numerous years, but with altered compensation. Pursuant to the provisions of W. Va. Code § 18A-4-8(m), Respondent is not permitted to alter Grievants' compensation for performing the identical assignments they performed during the previous school year. Accordingly, Grievants are entitled to the relief requested, i.e. compensation under the

previous year's terms for performance of their extracurricular assignments, which includes Grievant Aliff's ALC run.

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 grievance 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. Pursuant to the provisions of W. Va. Code § 18A-4-8(m), a board of education is prohibited from terminating an employee's contract and reissuing the contract with altered compensation terms, if the employee is serving in exactly the same position as the previous school year. See Crock v. Harrison County Bd. of Educ., 211 W. Va. 40, 560 S.E.2d 515 (2002).

3. Grievants have proven by a preponderance of the evidence that Respondent acted improperly when it altered the compensation provisions of their extracurricular contracts.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to compensate Grievants for their extracurricular bus runs pursuant to the previously used compensation system, retroactive to the beginning of the 2003-2004 school year, plus interest at the statutory rate.

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

Date: May 19, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge