WARREN BEVER,

Grievant,

v v.

Docket No. 03-33-064R

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent,

and

ARVIL WILEY,

Intervenor.

D E C I S I O N

Grievant, Warren Bever, filed this grievance on September 18, 2002, against his employer the Nicholas County Board of Education ("NCBOE" or "Board"). His Statement of Grievance asserts:

> The Grievant, a regularly employed school bus operator, alleges that the Respondent has denied to him the opportunity to return to an extracurricular assignment that the Grievant had held during the 2001 - 2002 school year. The Grievant alleges a violation of W. Va. Code § 18A-4-16(6).
>
> Relief Sought: The Grievant seeks reinstatement to the extracurricular assignment, retroactive wages and benefits, and interest on all monetary sums.

This grievance was denied at Level I and granted, in part, and denied, in part, at Level II. Hearing Examiner Jerry Wright ordered NCBOE to post and fill the position in accordance with W. Va. Code §18A-4-8b at the end of the 2002 - 2003 school year. Level III was waived. Grievant appealed to Level IV on March 13, 2003, and a Level IV hearing was held May 13, 2003. A Decision denying the grievance was issued on August 29, 2003, and Grievant appealed this ruling. When the circuit court requested the record, it was discovered the tape could not be found to transcribe. By Order

dated December 1, 2003, Judge Louis Bloom remanded the case for a hearing de novo. (See footnote 1) A hearing was held on January 20, 2004, and this case became mature for decision on February 2, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by NCBOE as a bus operator.

2. NCBOE had one extracurricular run it has rotated annually for almost 20 years because of an annual vote by the bus operators to treat this run in an alternative manner pursuant to W. Va. Code § 18A-4-16(5). This Code Section states:

> The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular 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 and by an affirmative vote of two thirds of the employees within that classification category of employment.

3. Under this rotation, once a bus operator had held this extracurricular assignment, the next most senior applicant received the position. (See footnote 3)

4. Grievant bid on and received the position for the 2001 - 2002 school year as he was the most senior applicant. (See footnote 4)

5. After the school year had ended, on July 1, 2002, W. Va. Code § 18A-4-16(6) came into effect. This Code Section stated:

> 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 [§ 18A-2-7], 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. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b [§ 18A-4-8b] of this article.

6. In August 2002, the bus operators again voted by a 2/3 majority to rotate the position with the most senior applicant who had not held the position to receive the position. Intervenor Wiley received the position.

7. Intervenor Wiley is more senior than Grievant.

8. Grievant then filed this grievance

alleging the new section to W. Va. Code § 18A-4-16 required NCBOE to return him to the extracurricular assignment.

Issues and Arguments

Grievant asserts the language in the new Code Subsection is clear and requires NCBOE to return him to the position. Respondent avers this would be unfair and believes the position should be posted under W. Va. Code § 18A-4-8b, and the position filled based on qualifications, evaluations, and seniority. (See footnote 5)

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 § 4.21 (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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant asserts there is conflict between the two subsections of W. Va. Code § 18A-4-16, with the new paragraph 6 which says the bus operator currently in the position"shall have the option of retaining the assignment if it continues," preventing the bus operators from voting to use an "alternative procedure."

The rules of statutory construction should be applied to examine subsection 5 in light of the new subsection 6. It is noted that "[t]he legislature, when it enacts legislation, is presumed to know of its prior enactments." Syl. Pt. 12, Vest v. Cobb, 138 W. Va. 660, 76 S.E.2d 885 (1953). "Statutes which deal with the same subject should be read in pari materia, unless the statutes exhibit an intent on the part of the Legislature that they should be separately construed," and both subsections "should be construed, if possible to do so, so that none should fail." Id. at Syl. Pts. 7 & 13. See Expedited Transp. Sys. Inc. v. Vieweg, 207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000); Syl. Pt. 2, Beckley v. Kirk, 193 W. Va. 258, 455 S.E.2d 817 (1995); Syl. Pt. 1, Transamerica Computer. Fin. v. Blueville

Bank, 190 W. Va. 474, 438 S.E.2d 817 (1993); Syl. Pt. 1, State ex rel. Slatton v. Boles, 147 W. Va. 674, 130 S.E.2d 192 (1963); Syl. Pt. 3, State ex rel. Graney v. Sims, 144 W. Va.72, 105 S.E.2d 886 (1958). Further,"[i]t is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof, but such rule of construction should not be invoked so as to contravene the true legislative intention." Vest at Syl. Pt. 9.

"In the construction of a statute a court should seek to avoid any conflict in its provisions by endeavoring to reconcile every word, section or part thereof, so that each shall be effective; and where a statute lends it self [sic] to two constructions, one of which will result in an irreconcilable conflict between its provisions, and the other will result in no conflict, the latter construction should be adopted." Syl. Pt. 3, Ebbert v. Tucker, 123 W. Va. 385, 15 S.E.2d 583 (1941). "It is the duty of a court to construe a statute according toits true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925). "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." Syl. Pt. 3, Pristavec v. Westfield Ins. Co., 184 W. Va. 331, 400 S.E.2d 575 (1990)(citing Syl. Pt. 3, Parkins v. Londree, 146 W. Va. 419, 127 S.E. 194 (1925)).

The undersigned Administrative Law Judge does not find there is a conflict between the two subsections. Since the legislature is "presumed to know of its prior enactments," it would have been aware when it enacted subsection 6 that it had previously given service personnel the right to vote for an alternative procedure. Vest, supra. In this case the bus operators have voted for this alternative procedure for many years, and it appears the process has worked well because the same procedure is approved year after year.

The purpose of subsection 6 is to assure that once an employee obtains an extracurricular assignment pursuant to W. Va. Code § 18A-4-8b he can retain that assignment until he no longer wants it. When using the alternative method voted on in subsection 5, subsection 6 does not apply. (See footnote 6) Additionally, in reviewing the facts of this situation, it would be unfair and not in keeping with the statutory emphasis on seniority to allow Grievant to keep a position he just

happened to possess just before the rules changed. That solution would make his placement the result of luck and timing, not the criteria identified in W. Va. Code § 18A-4- 8b or a vote pursuant to subsection 5. Clearly, that outcome would be unfair to other bus operators, and this outcome would not reflect the intent of the Legislature.

It should be noted Grievant cites Syllabus Point 1 of Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1992) as support for this grievance. Morgan stands for the proposition that "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee." That assertion would be inapplicable here, as this grievance actually pits employee against employee. Not only is there an Intervenor in this case who is more senior than Grievant, there were also the other bus operators who voted to have the position continue to rotate. To interpret the statue as argued by Grievant would favor Grievant to the detriment of other employees.

The above-discussion will be supplemented by the following Conclusions of Law.

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 § 4.21 (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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "The legislature, when it enacts legislation, is presumed to know of its prior enactments." Syl. Pt. 12, Vest v. Cobb, 138 W. Va. 660, 76 S.E.2d 885 (1953).

3. "Statutes which deal with the same subject should be read in pari materia, unless the statutes exhibit an intent on the part of the Legislature that they should be separately construed," and both subsections "should be construed, if possible to do so, so that none should fail." Id. at Syl. Pts. 7 & 13. See Expedited Transp. Sys. Inc. v. Vieweg, 207 W. Va. 90, 98, 529 S.E.2d 110, 118 (2000).

4. "It is a cardinal rule of statutory construction that a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof, but such rule

of construction should not be invoked so as to contravene the true legislative intention." Vest at Syl. Pt. 9.

5. "In the construction of a statute a court should seek to avoid any conflict in its provisions by endeavoring to reconcile every word, section or part thereof, so that each shall be effective; and where a statute lends it self to two constructions, one of which will result in an irreconcilable conflict between its provisions, and the other will result in no conflict, the latter construction should be adopted." Syl. Pt. 3, Ebbert v. Tucker, 123 W. Va. 385, 15 S.E.2d 583 (1941).

6. "It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense ofthe words in a statute, when such construction would lead to injustice and absurdity." Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925). "In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety." Syl. Pt. 3, Pristavec v. Westfield Ins. Co., 184 W. Va. 331, 400 S.E.2d 575 (1990)(citing Syl. Pt. 3, Parkins v. Londree, 146 W. Va. 419, 127 S.E. 194 (1925)).

7. If two subsections are in conflict it is necessary to devise a construction would not "lead to injustice and absurdity." Syl. Pt. 2, Click, supra.

8. There is no conflict between the two subsections as subsection 6 does not apply when service personnel have voted to use an alternative procedure for an assignment as allowed in subsection 5.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Nicholas 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 tosuch 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: February 23, 2004

Footnote: 1

Although the undersigned Administrative Law Judge does not know what happened to the tape, it is noted this loss probably occurred while the Grievance Board was flooded and was in make-shift offices.

Footnote: 2

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and the Board was represented by Attorney Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 3

Because of the rotating nature of the extracurricular assignment, a bus operator will usually not receive the position again. Many bus operators wait until they are close to retirement to apply for the position.

Footnote: 4

Grievant's claim that it was announced at the August 2001 vote that whoever got the position that year would probably have it until he retired is specifically rejected. Three other witnesses said this remark was not made, one of whom was the person alleged to have made the comment. Additionally, the change in W. Va. Code § 18A-4-16(6) was not effective until July 1, 2002, after the extracurricular assignment had ended for the school year.

Footnote: 5

Originally, NCBOE argued the bus operators should be allowed to vote on this issue, but after the Level II decision, NCBOE changed its opinion and agreed with the Hearing Examiner that the position should be posted, and the most senior, qualified applicant should receive the position. Because of the delay caused by the need to remand this grievance, NCBOE is currently following the procedure outlined in the Level II Decision.

Footnote: 6

If the bus operators vote not to continue to rotate the assignment, NCBOE would follow the procedure outlined in W. Va. Code § 18A-4-8b for filling this extracurricular assignment.