**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**REGINA GRAHAM, ET AL.,**

**Grievants,**

**v.**

**Docket No. 2008-0261-CONS**

**WOOD COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Regina Graham, Stephen T. Brown, Theresa A. Bonner, Darrell G. Deaton, Teresa J. Murphy and Robert R. McElwee, (jointly as "Grievants") grieve the failure of Respondent Wood County Board of Education ("BOE") to fill extracurricular bus assignments using a preferred recall list. As remedy, the Grievants seek to force the BOE to utilize a preferred recall list when assigning extracurricular bus assignments after bus assignments were economized and realigned, resulting in a reduction in the number of assignments. Additionally, Grievants seek back pay.

This grievance was filed on or about July 3, 2007. Both the Grievants and the Respondent agreed to waive the lower levels of the grievance procedure and proceed directly to Level Three. *See* August 20, 2007, *Order*. A Level Three hearing was conducted on May 14, 2008, by Administrative Law Judge (ALJ) Landon R. Brown.

At Level Three, the Grievants appeared by and through their counsel, John Everett Roush, Esquire, with the West Virginia School Service Personnel Association. Respondent BOE appears by and through its counsel, Dean A. Furner, Esquire. This matter became mature for decision on or about June 9, 2008, the date findings of fact and conclusions of law were due. Subsequently, on September 16, 2008, this matter was transferred to theundersigned ALJ for administrative reasons.

The parties have submitted proposed findings of fact and conclusions of law. This matter is ripe for consideration.

## Synopsis

Grievants maintain that the BOE violated West Virginia law because it failed to utilize a preferred recall list when reassigning extracurricular bus assignments after realigning and economizing bus routes. In addition, Grievants argue that the BOE has a pattern and practice of using a preferred recall list and it must continue to follow this pattern and practice. As relief, they request that the BOE be forced to utilize a preferred recall list. Additionally, Grievants seek back pay. Respondent BOE argues that it was not required to adopt a preferred recall list so long as it hired bus operators with the most seniority, in accordance with West Virginia Code §18A-4-8b.

The BOE is not required to utilize a preferred recall list where extracurricular assignments are reduced for lack of need. West Virginia Code §18A-4-16(6) applies and it does not require the utilization of a preferred recall list as provided for in West Virginia Code §18A-4-8b. However, it does require that a bus operator be offered his or her extracurricular assignment if the assignment continues to exist or is reestablished in a subsequent year. For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

## Findings of Fact

1. Grievants are employed by Respondent BOE as school service personnel in the bus operator classification category.

2. Grievants all performed and were assigned to extracurricular bus operator assignments in the 2006-2007 school year and in prior school years. Each Grievant held an extracurricular bus assignment contract for the 2006-2007 school year. (See footnote 1)

3. Respondent perceived a need to consolidate and realign the extracurricular assignments for bus operators in Wood County, West Virginia, in the interest of efficiency and economy. Respondent performed the realignment of bus routes. Bus runs were combined and reorganized.

4. Respondent terminated all extracurricular assignment contracts prior to the 2007-2008 school year.

5. The number of extracurricular assignments for the 2007-2008 school year was reduced from forty-one to twenty-two new assignments. Respondent did not utilize a preferred recall list. Respondent posted the twenty-two new assignments.

6. The extracurricular assignments were assigned on the basis of *overall* seniority. Whether an applicant held an extracurricular assignment for the 2006-2007 school year was not a factor considered by the BOE when filling these positions. This is to say that allbus operators in the county were given equal consideration for the assignments based upon his or her overall seniority.

7. At least initially, none of the Grievants received an extracurricular assignment for the 2007-2008 school year. It appears Grievant Regina Graham received an extracurricular assignment shortly into the 2007-2008 school year.

8. Coincidently, those bus operators who received extracurricular runs for the 2007-2008 school year previously held extracurricular runs. These bus operators also had more seniority than the Grievants.

**Discussion**

In non-disciplinary matters, grievants bear the burden of proving their allegations by a preponderance of the evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*. Hence, the arguments raised by the Grievants must be considered within the context of the burden of proof.

As an initial matter, this ALJ finds it necessary to discuss the parties' positions and the relevant law. West Virginia Code §18A-4-16(6), dictates the proper procedure to be used when extracurricular assignments are terminated for lack of need. The BOE is not required to utilize a preferred recall list as provided for in West Virginia Code §18A-4-8b. In this case, there is no evidence that the extracurricular assignments in question continue to exist or have been reestablished in a recognizable form. Respondent in this matter analyzes this issue beginning with West Virginia Code §18A-4-16(5), which provides that

> [t]he board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: [p]rovided, [t]hat 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.

From this statute, the Respondent directs this ALJ's attention directly to the language in West Virginia Code §18A-4-8b(a) (See footnote 2) which states that "[a] county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service."

Thereafter, Respondent cites *Board of Education v. Smith*, 202 W.Va. 117, 502 S.E.2d 214 (1998) (*per curiam*), and maintains that *Smith* stands for the proposition that where there is a reduction in force for extracurricular assignments within the meaning of West Virginia Code §18A-4-8b, a school board is simply required to release the least senior bus operators. *See* Respondent's *Proposed Findings of Facts and Conclusions of Law*, Paragraph 8.

The Grievants agree with Respondent's proposition that West Virginia Code §18A-4-8b is applicable. (See footnote 3) They claim West Virginia Code §18A-4-8b(m) requires that the Grievants be placed upon a preferred recall list. Like the Respondent, Grievants maintain that *Board of Education v. Smith*, 202 W.Va. 117, 502 S.E.2d 214, is directly applicable.

Both parties are incorrect in their assertions that the analysis of this grievance begins with West Virginia Code §18A-4-8b. The genesis of this analysis begins with the specific statute that discusses extracurricular assignments and lack of need, West Virginia Code §18A-4-16(6). "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). Likewise, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma- Chief Logan No. 4523, VFW of the United States, Inc.*, 147 W. Va. 645, 129 S.E.2d 921 (1963).

Where extracurricular assignments are terminated based upon lack of need, West Virginia Code §18A-4-16(6) applies. The specific statute that directly relates to the facts in this grievance must be examined. Paragraph Six of West Virginia Code §18A-4-16, as added to the statute in 2001, (See footnote 4) provides that

> [a]n employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retainingthe 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.

(Emphasis added). When considering this statute, it is imperative to recognize that it must be "strictly construed" in favor of the employee. *See Cruciotti v. McNeel*, 183 W. Va. 424, 428, 396 S.E.2d 191(1990) (citing West Virginia Code §18A-4-16 and requiring "strict construction" in favor of the employee). The term "strict' may generally be defined as narrow and restricted*. See Black's Law Dictionary* 1153 (7th ed. 2000). The term "construction" embodies a concept that "permits going beyond the express words used." *See International Nickel Co. v. Commonwealth Gas Corp.*, 152 W. Va. 296, 302,163 S.E.2d 677, 681 (1968). When considering these terms together, West Virginia Code §18A-4-16 must be construed in a manner that is narrowly in favor of the employee beyond the express words provided in the statute.

The language of West Virginia Code §18A-4-16(6) must be considered to determine what procedure the BOE must utilize when filling these extracurricular assignments. A county board may terminate an extracurricular assignment for lack of need. However, an employee may retain his or her extracurricular assignment in two scenarios.

First, West Virginia Code §18A-4-16(6) permits a employee to retain his or herextracurricular assignment where it "continues to exist" in a succeeding school year. (See footnote 5) In this case, the extracurricular assignments from 2006-2007 do not exist in an absolute, pure state for the 2007-2008 school year. However, some form of the assignments probably does continue to exist. This is not an instance where the work no longer needs to be completed. In this case, from an evidentiary standpoint, there is no indication that any Grievant's assignment continue to exist in a *recognizable* form. No Grievant has advanced this argument or offered evidence on this point.

Secondly, West Virginia Code §18A-4-16(6) requires that where an extracurricular assignment is reestablished in "any succeeding school year it shall be offered to the employee who held the assignment at the time of its termination." Similar to the above, in this case, no Grievant has advanced an argument that his or her extracurricular assignment has been reestablished in some *recognizable* form.

The BOE is not required to utilize a preferred recall list as required by West Virginia Code §18A-4-

8b. The Grievants' argument must fail. West Virginia Code §18A-4-16(6) applies where extracurricular assignments are terminated for lack of need. (See footnote 6) The Grievants have not established that they are entitled to an extracurricular assignment.

Grievants are not entitled to back pay because they have not established that theyshould have been offered an extracurricular assignment. A county board may terminate an extracurricular assignment for lack of need. No evidence has been presented to establish (1) a Grievant's specific assignment existed in an identifiable form or (2) a Grievant's specific assignment was reestablished in a recognizable form. It is not the province of this tribunal to assume facts that were not presented into evidence. *See generally Board of Educ. of Mercer v. Townsend*, 207 W. Va. 285, 531 S.E.2d 664 (2000) (*per curiam*); *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993).

Grievants bear the burden of proving the elements of this non-disciplinary grievance by a preponderance of evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). This burden encompasses the relief sought. Grievants have not met their burden of proof.

The following conclusions of law are appropriate in this matter:

**Conclusions of Law**

1. Grievants bear the burden of proving the elements of this non-disciplinary grievance by a preponderance of evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3. West Virginia Code §18A-4-16(6) applies to extracurricular bus assignments and must be strictly construed in favor of the employee. Where an assignment continues to exist or is reestablished in a subsequent year, an employee shall be given the option ofperforming the assignment.

4. Grievants have not established that their previous extracurricular assignments continue to exist or were reestablished.

5. The Grievants have not proven that they are entitled to back pay.

Wherefore, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: November 20, 2008**

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**Mark Barney**

**Administrative Law Judge**

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*Footnote: 1*

*Generally, extracurricular assignments are "activities that occur at times other than regularly scheduled working hours." W.Va. Code §18A-4-16(1). An employee's contract of employment is separate and distinct from the extracurricular assignment agreement. W.Va. Code §18A-4-16(4).*

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*Footnote: 2*

*In the Respondent's Proposed Findings of Fact and Conclusions of Law, it does not cite the specific paragraph to which it refers. However, Respondent does quote the specific language of Paragraph (a).*

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*Footnote: 3*

*Insofar as the Grievants argue that there is a pattern and practice of using a preferred recall list, the argument is not persuasive because West Virginia law delineates the procedure to be utilized when an extracurricular assignment "continues to exists" or is reestablished in succeeding school years.*

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*Footnote: 4*

*This Paragraph was added after the West Virginia Supreme Court's decision of Board of Education v. Smith, 202 W.Va. 117, 502 S.E.2d 214.*

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*Footnote: 5*

*The facts in this grievance are different from the facts in Fry v. Mercer County Bd. of Educ., Docket No. 07-27-011 (July 31, 2007). In Fry, the extracurricular bus assignments were combined into two full-time positions. In this case, the assignments were economized, realigned and treated in the subsequent year as extracurricular assignments.*

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*Footnote: 6*

*Insofar as Garner v. Monongalia County Bd. of Educ. v. Strader, Docket No. 02- 30-352 (Mar. 28, 2003), suggests that West Virginia Code § 18A-4-16(6) is inapplicable in this scenario, it is expressly rejected.*