THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ILLA POWROZNIK-HESS,

Grievant,

v.

DOCKET NO. 07-30-108

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed on October 10, 2006, by Grievant, Illa Powroznik-Hess. Her statement of grievance reads:

> Was not advised through RIF, word or mouth or otherwise of the termination of my Shack run, which I had a contract on.

The relief sought by Grievant is "[t]o be compensated with all back pay, interest and benefits due me."

Grievant's supervisor denied the grievance, and Grievant appealed to level two of the grievance procedure. After a level two hearing was held on March 9, 2007, the grievance was granted in part,

and denied in part on March 22, 2007. The level two decision found that Grievant was “due 4 days of extracurricular pay of four (4) hours at her rate of pay and 10% interest for the four (4) hours pay.” Grievant bypassed level three, appealing to level four on March 26, 2007. A level four hearing was held before the undersigned on February 8, 2008, in the Grievance Board's Westover office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Jason S. Long, Esquire, Dinsmore & Shohl. This matter became maturefor decision on March 31, 2008, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. (See footnote 1)

Synopsis

During the 2005-2006 school year, Grievant held an extracurricular bus run, commonly referred to as “the Shack run.” Grievant was informed on September 13, 2006, that this run would not be needed for the 2006-2007 school year. She did not receive notice during the Spring of 2006 that this run would not be needed, as is required by statute. Relying upon other Grievance Board decisions, Grievant requested as relief back pay for the 2006-2007 school year, plus interest. The level two decision awarded Grievant four days of back pay, but did not award her any back pay beyond October 1, 2006, because Grievant had bid on, and began working in, another extracurricular assignment on October 2, 2006. Respondent argued that Grievant had mitigated the damages when she began working in this assignment on October 2, 2006, and it was not required to pay her more than the four days of back pay awarded at level two, and paid. The evidence established that Grievant could have performed the Shack run and the run she was awarded beginning October 2, 2006. Grievant is entitled to back pay for the remainder of the 2006-2007 school year. The following Findings of Fact are made based upon the evidence presented at levels two and four.

Findings of Fact

1. Grievant is employed by the Monongalia County Board of Education (“MBOE”) as a bus operator.

2. During the 2005-2006 school year she held an extracurricular run, commonly referred to as the “Shack run.” This run involved the transportation of pre-school students, and normally began around mid-September, about two weeks after school started. Grievant began preparing her bus for

the run, the fifteen minute "pre-trip," at 11:30 a.m. each weekday, and completed the run at 1:15 p.m. Grievant was required to be at her first stop on this run by noon.

3. Grievant did not receive notice during the Spring of 2006 that the Shack run would not be needed for the 2006-2007 school year.

4. Grievant was informed on September 13, 2006, that the Shack run would not be needed during the 2006-2007 school year, and that she would not be paid for this run.

5. In late September 2006, Grievant bid on a mid-day extracurricular run, referred to as the "University High School MTEC run," and was awarded this run. On October 2, 2006, Grievant began working in this assignment. Grievant began the pre-trip for this run at 10:45 a.m. each week day, dropped the students off at University High School at 11:45 a.m., and returned the bus to the location where the bus was normally parked by around 12:15 p.m. Had Grievant still had the Shack run, she would have departed University High School at 11:45 a.m., and arrived by noon at her first stop on the Shack run.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. (See footnote 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. *Id*.

"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 assignment expires 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)." *Hixenbaugh/Mullins v. Monongalia County Bd. of Educ.*, Docket No. 99-30-530 (April 24, 2000). There is no question that Grievant did not receive the required notice in the Spring of 2006, that her extracurricular run would not exist after the end of the 2005-2006 school year. (See footnote 3)

Respondent pointed to the first and third sentences of paragraph six of W. Va. Code § 18A-4-16, and argued that Grievant was only entitled to retain the extracurricular run if it continued to exist in the next school year. Paragraph six of W. Va. Code § 18A-4-16 states in its entirety:

> 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.

(Emphasis added.) The second sentence of this paragraph makes it clear that Respondent's interpretation is wrong, and that the discussion in the preceding paragraph of this decision is applicable to this situation. Respondent was required to give notice to the Grievant during the Spring of 2006, that her extracurricular run was being terminated.

The only issue is what relief Grievant should receive. The Grievance Board has in the past awarded as relief, to a Grievant who did not receive this required notice, payment for the extracurricular assignment for the entire school year. *Yeager v. Kanawha County Bd. of Educ.*, Docket No. 03-20-388 (Apr. 6, 2004)*; Hixenbaugh, supra; Doss, supra.* In this case, after the level two decision, Respondent paid Grievant for four days. Respondent argued it is not required to pay Grievant for any period after October 1, 2006, when she began the University High School MTEC run. Respondent argued Grievant had mitigated her damages by accepting this run. Respondent did not argue Grievant could not have performed both the University High School MTEC run and the Shack run, had it still existed.

Grievant presented testimony that the University High School MTEC run would not have interfered with the Shack run, and she could have made both runs. While Grievant only had fifteen minutes to get from University High School to the first stop on the Shack run, the testimony was that this was plenty of time. Respondent did not present any testimony to dispute this, nor was there testimony that Grievant would not have been allowed to take on both runs. The undersigned must conclude that

Grievant could have made both runs, and is entitled to back pay for the 2006-2007 school year, beginning October 2, 2006. As Grievant was only paid each year from the time she began making this run, and there was no set date in September when it always started, Grievant has notdemonstrated that she was entitled to be paid prior to the last week of September, as determined by the level two decision, and indeed Grievant did not assert she was entitled to payment for any additional days in September.

The record does not reflect whether Grievant was paid for her extracurricular runs on an hourly basis, but it appears that this may be the case. If this is how Grievant is paid, Respondent is correct that Grievant is not entitled to be paid for the period of time from 11:30 a.m. to 12:15 p.m., as she has been paid for an extracurricular run during this time already. Grievant's University High School MTEC run did not end until 12:15 p.m., when she returned the bus to its parking space. (See footnote 4)

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. "[C]ounty 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 assignment expires under its own terms. *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986); *Smith v. Bd. ofEduc.*, 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)." *Hixenbaugh/Mullins v. Monongalia County Bd. of Educ.*, Docket No. 99-30-530 (April 24, 2000).

3. Grievant did not receive the required notice in the Spring of 2006 that her extracurricular run would not exist after the end of the 2005-2006 school year.

Accordingly, this grievance is **GRANTED**, and the Monongalia County Board of Education is **ORDERED** to pay Grievant back pay, plus interest, at the statutory rate, for the extracurricular "Shack" bus run, from October 2, 2006, through the end of the 2006- 2007 school year, and to credit her with any benefits to which she would have been entitled had she performed the "Shack" bus run for this period. As Grievant has already been paid for the time period from 11:30 a.m. to 12:15 p.m., as part of the University High School MTEC run, Respondent is not required to include this time as part of the "Shack" run in calculating Grievant's time for purposes of this award.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 2) 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 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.

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BRENDA L. GOULD

Administrative Law Judge

Date: May 29, 2008

Footnote: 1

Grievant asked that the record be left open for submission of an affidavit from John Carpenter as an exhibit after the hearing. This request was granted, with the understanding that Respondent would be allowed the opportunity to cross-examine Mr. Carpenter, if necessary. Grievant submitted the affidavit on February 21, 2008, and Respondent advised the undersigned on February 29, 2008, that Respondent did not need to cross-examine Mr. Carpenter. The affidavit of John Carpenter is marked as Grievant's Exhibit 1, and is ORDERED admitted into the record.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code

§§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

Respondent raised the issue of whether Grievant had a contract for her extracurricular position, but did not place any evidence into the record that she did not have a contract. It is well settled that "'[t]he fact that Respondent had not issued a written contract for Grievant [for the current year's extracurricular assignment] does not alter Grievant's rights to have such a contract, and the rights he would have had under this contract if it had been issued properly,'" including the right to notice that the extracurricular assignment would no longer exist. Hixenbaugh/Mullins v. Monongalia County Bd. of Educ., Docket No. 99-30-530 (April 24, 2000), quoting Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996). Respondent did not assert that Grievant was not properly placed in this assignment, and Grievant testified that she bid on the assignment.

Footnote: 4

Had Grievant also had the Shack run, she would have left University High School at 11:45 a.m., and proceeded to the first stop on the Shack run, arriving there at noon, rather than returning the bus to its parking space, and possibly doing a post-trip. So even though the time for which she was entitled to payment overlapped, she could have worked both runs.