STEVE ROUSH,

Grievant,

v. DOCKET NO. 95-18-020

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants Steve Roush and Earl DeLong ("Grievants") are employed as bus operators by the Jackson County Board of Education ("Respondent"). On August 31, 1994, they initiated virtually identical grievances as follows:

> Grievants grieve their route schedules for the 1994-95 school term are improper because 1) they have extra assignments of driving a handicap bus, 2) they have been singled out from among all the other drivers for this assignment without good reason, 3) they are now assigned responsibility for two buses, 4) they were not properly notified of their change of assigned bus routes, and 5) other drivers on extra runs get extra pay.

Grievants allege the addition of the special education runs constitute changes so substantial they should have been processed as transfers under W. Va. Code § 18A-2-7. Grievants also claim, because of the schedule changes, a portion of their duties became substantially similar to those of certain bus operators who hold supplemental contracts to make mid-day runs. Under the uniformity provisions of W. Va. Code § 18A-4-5b, Grievants claim they areentitled to the same supplemental pay as the drivers who make mid-day runs.

Procedural Background

Grievants' supervisor denied the grievances at level one. The grievants then appealed to level two, where their individual grievances were consolidated, and an evidentiary hearing was held on November 30, 1994. (See footnote 1) At the level two hearing, Grievant Roush, by his representative,

raised an issue concerning a change made in Mr. Roush's bus route after the school year had begun and after this grievance had been filed. Respondent objected to this issue as it was not part of the original grievance, and as it was a substantially different issue than those addressed in the grievance. The level two hearing examiner agreed with Respondent and the new issue was not addressed in the level two decision, rendered on December 20, 1994.

The Jackson County Board of Education affirmed the level two decision on January 5, 1995, and appeal was made to level four on January 17, 1995. The parties thereafter requested that the matter be submitted on the record developed below, and proposed findings of fact and conclusions of law were submitted on or about May 2, 1995.

Grievants, in their brief, aver that the issues to be determined are two-fold: 1) Whether or not the Grievants' action of transporting the special education student in question is partof their regular run responsibility or is a separate extracurricular run (as defined in W. Va. Code § 18A-4-16); and 2) whether or not the Jackson County Board of Education violated W. Va. Code § 18A-4-5b when it required the Grievants to make extracurricular runs without compensation while other employees making similar extracurricular runs were compensated.

Grievants then note, "several other issues which are listed on the grievance form and addressed at the Level II hearing were not addressed in this brief. Those issues are withdrawn and a determination on these matters is not requested."

Respondent filed a Reply Brief on May 15, 1995, objecting to the introduction of a separate "extracurricular assignment" issue for the first time at level four, stating, "they have so altered the original grievance as to render it a different grievance", citing W. Va. Code § 18-29-3(j):

> (j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. . . .

Grievants are now relying upon an entirely different statute to support their claims, thus altering the substance of the grievance. The introduction of the "extracurricular assignment" issue is not permitted at level four, as it renders the originalgrievance a substantially different grievance. W. Va.

Dept. of Health and Human Services v. Hess, 432 S.E.2d 27 (W. Va. 1993); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995).

Therefore, the only issue to be decided is whether Respondent violated the uniformity provisions of W. Va. Code § 18A-4-5b. The undersigned finds that it has not and this grievance must be denied.

The facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants are employed by Respondent as bus operators. They are assigned to the Ravenswood transportation zone, and have a regular morning run and a regular afternoon run.

2. Before the 1994-95 school term, school officials learned a special education student who used a wheelchair would require transportation to and from school. The student lived in the Ravenswood region of the county, but in an area which was not already served by one of six special education buses with wheelchair lifts.

3. In scheduling bus routes for the 1994-95 school term, Respondent identified two bus operators (Grievants) who could meet the student's needs. Both bus operators already had routes in the Ravenswood zone. Under the new arrangement, Grievant DeLong would complete his established morning run on a regular school bus, then make a run in the special bus to bring the student to school. Similarly, Grievant Roush would complete his established afternoon run in a regular school bus, then make a run in the special bus to take the student home. (See footnote 2)

4. Grievant DeLong was assigned the additional run because he could complete his regular morning run, get the special bus, and drive to the student's home earlier than the other drivers assigned to that area. He was thus in a position to deliver the student to school earlier than the other drivers, infringing less on her instructional time.

5. Grievant Roush was assigned the afternoon run because his established afternoon run was one of the shortest in the area, and it ended in close proximity to the school from which the student was to be transported to her home.

6. Grievants were given their run assignment schedules on August 22, 1994, when they first reported to work for the 1994-95 school term. This was prior to the beginning of school on August 26, 1995. The assignments included the "second runs" involving the special education student.

7. Ten or twelve other bus operators in the county also make two morning or two evening runs.

Like the Grievants' runs, the two runs made by the other bus operators are not always in the same area or along the same routes.

8. None of Respondent's bus operators are paid additional compensation or a salary supplement for making a second morning or evening run. The second runs are considered to be part of the bus operators' regular morning or evening duties, and part of their regular full-time assignments.

9. The normal work day for Respondent's full-time service employees is eight hours. R Ex. 14. Neither Grievants nor the other drivers with second runs work eight-hour days as part of their regular full-time employment. On average, Respondent's bus operators receive a full day's pay for working about four and one-half hours. Grievant Roush works an average of three and one-half hours to three hours and forty-five minutes, even with the addition of the second run. (See footnote 3)

10. Four of Respondent's bus operators make mid-day bus runs, lasting three hours, shuttling students to and from the multi-county technical center. These drivers also hold regular full-time contracts under which they make morning and evening runs to bring students to and from school. They are paid a supplement for makingthe mid-day vocational school runs. The vocational school runs were posted, and Grievants were eligible to apply.

Discussion

Grievants allege that Respondent has violated the uniformity provision of W. Va. Code § 18A-4-5b, because other drivers receive extra compensation for driving extra bus runs while they do not. Grievants' second runs cannot be compared to mid-day vocational runs for which Respondent compensates its drivers with supplemental pay. Grievants' second runs are part of their regular assignments. The mid-day vocational runs are in addition to the bus operators' regular assignments and last 3 hours. Grievants are not similarly situated to the drivers making the mid-day runs. Rather, Grievants are more similarly-situated to the drivers who also have second runs in the morning and evenings. Grievant Roush conceded at the level two hearing that a lot of operators have second runs, stating:

> A lot of us with our routes we have to go into schools, drop off students, and maybe pick other ones up. It depends on your location or whatever with the same bus on the same run.

Grievants do not propose the drivers with second runs should be additionally compensated for those runs. Moreover, Grievants have failed to prove Respondent had a policy or initiated a practice to compensate its operators for performing second runs in addition to their "regular" runs. See Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990). Therefore, Respondent is not bound by the uniformity requirements of W. Va.Code § 18A-4-5b with respect to the second runs performed by Grievants.

Finally, notwithstanding the ruling herein that Grievants cannot raise the new issue of "extracurricular assignments", Grievants would not have prevailed on the merits of their case in any event. Although a recital of all of the pertinent facts is not necessary here, the evidence does not support Grievants' claim that Respondent violated W. Va. Code § 18A-4-16.

"Regular runs" generally has been defined as the transportation of students from their homes to school and from school to their homes. See Fuchs v. Brooke County Bd. of Educ. Docket No. 92-05-047 (May 19, 1992). Unlike the mid-day vocational school shuttle runs, the Grievants' "second runs" are part of the their regularly scheduled morning and afternoon runs. The second runs involve the transportation of a student from her home to school and from school to her home, and last only about 45 minutes per day. "[A board of education] does not violate any law, regulation or policy when it assigns its bus operators additional driving duties associated with ongoing curricular runs, of whatever nature, time or source, in order to fulfill the operators' . . . work day. Id. (emphasis in original). Thus, based on the findings herein and the applicable law, Grievants have not proven a violation of W. Va. Code § 18A-4-16.

Conclusions of Law

1. Grievants must prove the allegations contained in their grievance by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 93-06-416 (Feb. 28, 1994).

2. The uniformity provision of W. Va. Code § 18A-4-5b provides, "uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed in performing like assignments and duties within the county." Since Grievants, like all bus operators with second runs as part of their regular routes, were not paid additional salary for the second run, they

have failed to prove a violation of the uniformity statute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 25, 1995

Footnote: 1 *Although Mr. DeLong's name did not appear on the level four appeal form, it is undisputed that he continues to be a part of this grievance.*

Footnote: 2 *In mid-September, the order of Roush's route was changed so that he would take the special education student home first, then return to make his regular afternoon run. This "change" in schedule was the issue Grievant attempted to raise at level two, but was rejected by the level two hearing examiner as constituting a new grievance.*

Footnote: 3 *This estimate includes pre- and post-trip responsibilities. Grievant Roush's actual driving time under the assigned schedule for the 1994-95 school year was 43 minutes for his morning run, 60 minutes for his first afternoon run, and 41 minutes for his second afternoon run, for a total of two hours and 24 minutes per day.*

Grievant DeLong did not attend the level two evidentiary hearing, and no evidence was offered to show how much time his pre- and post-trip responsibilities consumed. However, his actual driving time for the 1994-95 school year was 70 minutes for his first morning run, 45 minutes for his second morning run, and 70 minutes for his afternoon run, for a total of three hours and five minutes per day. R Ex. 10.