CHRIS BAKER,

Grievant,

v. **Docket No. 99-22-167**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On March 31, 1999, Chris Baker (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Lincoln County Board of Education (LCBE) had improperly failed to compensate him for performing breakfast duty. The grievance was waived to Level II where an evidentiary hearing was held on April 15, 1999. Thereafter, a Level II decision denying the grievance was issued by the Superintendent's designee, Charles S. McCann, on April 19, 1999. Grievant elected to bypass Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on April 28, 1999. On June 3, 1999, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. (See footnote 1) At the conclusion of that hearing, the parties agreedon a briefing schedule, and this matter became mature for decision on July 8, 1999, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Lincoln County Board of Education (LCBE) as Principal of Branchland Elementary School (BES).

2. In September 1998, the extracurricular position of “breakfast duty supervisor” for BES was posted. The duties of the position involved supervising children eating breakfast at the school from

7:00 to 7:30 A.M.

3. The regular school day at BES begins at 7:30 A.M. and ends at 3:30 P.M. The breakfast supervisor position is compensated at the rate of $2 per day. The position was open for any teacher or supervisory aide assigned to BES. No employees applied for the position.

4. When no employees volunteered to perform breakfast duties at BES, Grievant began performing those duties. Had Grievant not stepped in, approximately 160 elementary students would have been unsupervised.

5. Prior to the 1998-99 school year, Grievant occasionally performed the duties of the breakfast supervisor at BES when the person under contract to perform those duties was not available. Grievant did not seek compensation for performing those occasional duties. 6. As BES' Principal, Grievant is required to be at the school from the time the first students arrive in the morning at approximately 7:00 A.M., until the last students leave in the afternoon at approximately 3:00 P.M. During the 1998-99 school year, Grievant normally reported to work at 6:30 A.M., in order to complete all assigned duties.

7. While performing breakfast supervisor duties, Grievant is not available to answer phone calls, meet with parents or teachers, or perform other duties which require a certified administrator. There is a one-half time secretary assigned to BES, but she does not report to duty until 10:30 A.M. Grievant testimony at L II & IV.

8. In addition to maintaining discipline among the students, Grievant's duties as breakfast supervisor primarily involve providing assistance to the smaller children with such chores as opening their milk cartons. Grievant testimony at L II & IV.

9. After the beginning of the 1998-99 school year, Grievant submitted two requests that he be awarded an extracurricular assignment for the breakfast supervisor duties he was performing. Grievant sent these requests to LCBE's Personnel Director, Charles S. McCann. The first request was submitted sometime in November 1998, and Grievant received no response. Grievant testimony at L II. The second request was submitted on January 29, 1999, and Grievant received a written response from Mr. McCann on February 3, 1999, indicating that performing the breakfast duties came within Grievant's responsibility as the school principal. G Exs 2 & 3 at L II.

10. Breakfast supervisory duties are performed at other LCBE schools by school service personnel (aides who perform supervisory duties), teachers, and principals, either singly or in various

combinations. R Ex A at L IV. 11. Although LCBE has a general policy against compensating employees who perform additional duties during their regular eight-hour day, all school service personnel are compensated for performing breakfast duties, including those who perform breakfast duties inside their regular day. All teachers who perform breakfast duties outside their regular eight-hour day are compensated, and at least one teacher who performs breakfast duties inside her regular eight-hour day receives compensation. Most teachers who perform breakfast duties during their regular eight-hour day, including all teachers who perform such duties on a rotating basis, are not compensated. No LCBE principals receive compensation for performing breakfast duties, whether they perform such duties inside or outside their regular workday, although only one other principal, Jim Nelson at Pleasant View School, is required to perform such duties outside his regular workday without assistance from his staff. R Ex A at L IV; McCann L IV testimony.

12. LCBE employees who are paid to perform breakfast duties as described in Finding of Fact Number 11, receive such compensation under an extracurricular employment contract.

13. Grievant has a Master's Degree plus 45 additional hours of graduate credits, with over 26 years of experience as a teacher and administrator. His daily rate of pay from LCBE is $210.37. G Ex C at L IV. LCBE pays classroom teachers with comparable academic achievement and experience a $195.70 daily rate. G Ex B at L IV.

14. LCBE receives reimbursement for the “overhead cost” of employees performing breakfast or lunch supervisory duty from the United States Department of Agriculture through the West Virginia Department of Education, in accordance with aformula governing reimbursement of the school nutrition program. McCann testimony at L IV.

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 § 4.19 (1996); 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. W. Va. Code § 18A-2-9 contains the following provisions pertinent to this grievance:

> Upon the recommendation of the county superintendent of schools, the county board of education shall employ and assign, through written contract, public school principals who shall supervise the management and the operation of the school or schools to which they are assigned. Such principals shall hold valid administrative

certificates appropriate for their assignments.

Under the supervision of the superintendent and in accordance with the rules and regulations of the county board of education, the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned.

The principal shall perform such other duties as may be assigned by the superintendent pursuant to the rules and regulations of the county board of education.

On or before the first day of July, one thousand nine hundred ninety- three and continuing thereafter, each county board of education shall employ a full-time supervising principal at each school whose net enrollment equals or exceeds one hundred seventy students. A principal assigned to a school with a net enrollment equal to or greater than one hundred seventy students may not be assigned any teaching duties except on a temporary emergency basis.

Nothing contained in this section shall be construed to reduce or limit the rights and privileges of principals and assistant principals as teachers under the provisions of section one [§ 18-1-1], article one, chapter eighteen of the code of West Virginia as amended; section one [§ 18A-1-1], article one, chapter eighteen-a; and other provisions of this code. . . .

Also pertinent to this grievance is the portion of W. Va. Code § 18A-4-16 which states:

The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

Finally, the following definition in W. Va. Code § 18-1-1 is germane to this decision:

“Teacher” shall mean teacher, supervisor, principal, superintendent, public school librarian, registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has a baccalaureate degree; or any other person regularly employed for instructional purposes in a public school in this state.

The breakfast supervisor duties at issue meet the definition of an extracurricular assignment

under W. Va. Code § 18A-4-16(1). See Hussell v. Mason County Bd. of Educ., Docket No. 96-26-073 (July 24, 1996). Indeed, LCBE concedes that it established extracurricular contracts with a number of teachers and service personnel performing such duties at other schools, and would have agreed to a contract compensating a teacher or service employee at BES for performing these duties, had anyone come forward in response to the posting. Moreover, because these duties constitute an extracurricular assignment under W. Va. Code § 18A-4-16, no teachers or service personnel can beinvoluntarily assigned such duties. Brown v. Upshur County Bd. of Educ., Docket No. 96- 49-388 (Jan. 31, 1997); Hussell, supra. See Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990).

The issue presented by this grievance is whether Grievant, as a school principal, is protected by these provisions. The parties agree that this is substantially an issue of first impression before this Grievance Board. LCBE generally argues that these duties fall within the broad duties assigned to school principals under W. Va. Code § 18A-2-9. LCBE also notes that pay for extracurricular duties is not ordinarily mandated when the duties fall within the employees' normal work day, citing Norman v. Greenbrier County Bd. of Educ., Docket No. 96-33-263 (Apr. 15, 1997). However, Norman held that service personnel performing breakfast duty were not similarly situated to professional employees performing such duties, and the grievants had thereby failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m). Norman, supra. Moreover, the evidence in this matter indicates that LCBE routinely compensates service personnel and a teacher who perform breakfast duties within their regular workday.

Nonetheless, LCBE correctly contends that W. Va. Code § 18A-2-9 places unique responsibilities on a school principal, including the obligation to insure the students assigned to his school are properly supervised at all times. Grievant does not suggest that he should be compensated if he fills in for an employee performing extracurricular breakfast duties, as he did during previous years. Indeed, principals can be reasonably expected to fill in for absent teachers on an emergency basis when no substitute is available, and classes cannot be shifted among the remaining staff.

Grievant argues that the language in W. Va. Code § 18A-2-9 which provides, “[n]othing contained in this section shall be construed to reduce or limit the rights and privileges of principals and assistant principals as teachers,” compels LCBE to award him an extracurricular contract on the same terms as the teachers who perform breakfast duty. Although W. Va. Code § 18A-4-16 only speaks to “teachers

and service personnel" performing extracurricular assignments, the definition of "teacher" in W. Va. Code § 18-1-1 is sufficiently expansive to permit a county board to enter into an extracurricular contract with a school principal, should it choose to do so. However, W. Va. Code § 18A-2-9 permits a county board to adopt a policy restricting principals from performing extracurricular assignments. Holmes v. Bd. of Educ., Kanawha County Cir. Ct., No. 98-AA- 9 (Sept. 30, 1998), rev'g Holmes v. Berkeley County Bd. of Educ., Docket No. 96-02-070 (Jan. 13, 1998). Indeed, reading W. Va. Code § 18A-2-9 in its entirety suggests a legislative intent to insure that school principals concentrate their time and energy on managing and supervising their schools.

LCBE does not prohibit school principals from performing extracurricular duties. To the contrary, LCBE expects Grievant to manage his school, while simultaneously performing breakfast supervisory duties in the cafeteria, and to perform this duty without any additional compensation. Regardless of the amount of compensation at issue, the current arrangement represents a poor use of Grievant's time as a professional administrator. Although there may be a variety of better solutions available to the parties, Grievant has demonstrated that he has been involuntarily performing an extracurricularduty, and is entitled to compensation at the rate of $2 per day for each day he performed those duties during the 1998-99 school year. See Hussell, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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 § 4.19 (1996); 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. An extracurricular assignment can only be made by mutual consent of the parties. W. Va. Code § 18A-4-16; Hussell v. Mason County Bd. of Educ., Docket No. 96- 26-073 (July 24, 1996).

3. No provision in W. Va. Code §§ 18A-4-16 or 18A-2-9 necessarily prohibits an elementary school principal from holding an extracurricular assignment.

4. Grievant has demonstrated that he has been required to perform an extracurricular assignment without his consent in violation of W. Va. Code § 18A-4-16. See Hussell, supra.

Accordingly, this grievance is **GRANTED**. Respondent Lincoln County Board of Education is hereby **ORDERED** to pay Grievant $2 per day for each day he performedbreakfast supervisor duties at Branchland Elementary School during the 1998-99 school year.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 11, 1999

Footnote: 1

Grievant was represented by Anita Mitter with the West Virginia Education Association. Respondent was represented by counsel, James W. Gabehart.