REX TONEY,

Grievant,

v. **DOCKET NO. 98-22-424**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Rex Toney filed this grievance against Respondent Lincoln County Board of Education on or about August 21, 1998. (See footnote 1) The statement of grievance was amended at Level II to read as follows:

> Violation of WV Code 18A-4-8b - definition of "bus operator" who was asked to supervise students and drive a run for which he was not contracted.

The relief sought is, "to receive pay one pay grade higher for supervision and compensation for run." Grievant's representative clarified at the Level II and Level IV hearings that Grievant was seeking compensation at the statutory rate for a supervisory aide, for five hours when he was asked to supervise students on a picnic and swimmingtrip.

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Lincoln County Board of Education ("LBOE") as a regular bus operator.

2. In July, 1998, LBOE posted 17 bus operator positions which were for four days during the summer of 1998, to transport students in the Transition Program from their homes to a high school. Attached to the posting was information regarding two trips the students would go on, to Great Oaks Farm and to Mud River Dam.

3. The Transition Program brings together all the students who will be in the seventh grade in the coming school year in the county, in order to assist them in adjusting to the schedules they will

face in high school. The students participate in four days of activities with the idea of having the students get to know one another and work together. This was the fourth year of the Program. Each year, on one of the days the students must be transported from the high school to Great Oaks Farm for the day. During 1998, a new activity was added, and the students also had to be transported from the high school to the Mud River Dam.

4. Grievant had served as a bus operator for the Transition Program in past years. He bid upon one of the posted summer bus operator positions, and was awarded that position.

5. The posting for the position awarded to Grievant described his bus run as "Big Ugly Area, Toney Addition, Rt 10 to Harts High [School]." 6. Grievant's summer bus run was for August 11, 12, 13, and 14, 1998. He was paid the regular daily rate for a bus operator, for eight hours each day. His run began at 7:00 a.m., and he completed the run at 8:30 a.m. In the afternoon he started the run at 2:00 p.m., and completed the run around 3:30 p.m. (See footnote 2) Between 8:30 a.m. and 2:00 p.m., on August 11, 13 and 14, Grievant was free to do as he chose. This summer bus run was similar to Grievant's bus run during the school year, but took about 30 minutes less to complete as there were fewer students and four miles were omitted during the summer.

7. Grievant was aware that in past summers, bus operators transporting students in the Transition Program had volunteered to make the trip to Great Oaks Farm, without additional compensation. In keeping with this practice, during the summer of 1998, one of the four bus operators transporting students to and from Harts High School, volunteered to transport the students, without additional pay, to Great Oaks Farm. Grievant told the other drivers he would volunteer to transport the students to Mud River Dam, on August 12, 1998, and the four drivers agreed to this. He was planning to stay at Mud River Dam until it was time to return the students to the high school.

8. On the day the students were to be transported to Mud River Dam, Peggy Adkins, the principal at Harts High School, told the four bus operators that Tina Black, a secretary, had called and told her all the bus operators were required to go to Mud River Dam with the students, they would have to supervise the students while they were fishing, swimming and picnicking at the Dam, and if the bus operators did not do this, they would not get paid for the day. 9. The four bus operators at Harts High School complied with this directive. Grievant drove one of the buses, and another driver also took a bus, although only one bus was necessary. Grievant stayed at the Dam with the students and helped supervise them until it was time to return them to the high school. Other

employees were at the Dam who were primarily responsible for supervising the students. It took five hours to transport the students to Mud River Dam, wait with them while they engaged in the planned activities, and return them to the high school. The bus operators were not paid any additional amount for going to the Dam.

10. Grievant normally has no responsibility for supervising students once they leave the bus.

Discussion

The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant's representative did not state why Grievant should be paid for driving the bus to Mud River Dam. Grievant stated he thought it was an extracurricular run for which he should be reimbursed, as was done during the school year. LBOE pointed out that Grievant's summer schedule was shorter than his schedule during the school year, Grievant was entirely familiar with the way transportation for the Transition Program trips had been handled in past summers, and that Grievant had intended to make the trip to Mud River Dam anyway, on what he considered a volunteer basis, before he was told he had to go. LBOE argued that the Mud River Dam trip was a part of the Transition Program, and was part of the summer position.

W. Va. Code § 18A-4-16 defines extracurricular assignments, and provides:

> (1) 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: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] or this article.

Neither party addressed what this Code Section means. This Grievance Board has previously decided, without discussing what was then the newly enacted proviso:

> Where a county board of education has a long-standing practice and policy requiring its bus operators to remain on standby status between their morning and afternoon bus runs to perform occasional uncompensated emergency driving or other additional driving during the regular work day, such work becomes part of the operators' work day, and not work for which additional compensation must be paid.

Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997). The parties did not address the new proviso, or whether it would have any impact on the ruling in Blankenship.

It is not clear whether the trip to Mud River Dam was explicitly made a part of the bus operator positions in the posting itself, although LBOE could have done so. Pugh v. Hancock County Bd. of Educ., Docket No. 94-15-336 (Mar. 13, 1995); Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (May 19, 1992). The posting placed into evidence does not refer to any of the trips, but Charles McCann, Drug Free Schools Coordinator and Personnel Director for LBOE, testified the trip information was attached to the posting. The past practice was not to pay drivers for making trips which were part of the summer Transition Program and which occurred during the school day. As LBOEpointed out, Grievant was well aware of this practice, as he had previously been employed as a bus operator in this Program. He was aware he would not be compensated for this trip when he and the other drivers agreed that he would make the run to Mud River Dam on August 12, 1998, and he had intended to stay the entire day before Principal Adkins told him Ms. Black said he had to stay. He knew he had not signed an extracurricular contract, and the trip had not been separately posted for competitive bid as an extracurricular run. There is no indication that, at the time he made the trip, he informed anyone that he expected to be compensated. Grievant knowingly volunteered to make the trip. Grievant was being paid for eight hours, and he worked no more than eight hours. The fact that Grievant was directed to make the run and stay at Mud River Dam may have upset Grievant, but it is irrelevant. Under the facts of this case, Grievant was not affected in any way by this directive, and is entitled to no additional compensation as a bus operator for making the run to Mud River Dam on August 12, 1998, and remaining on site throughout the day. Blankenship, supra. See also, Anderson v. Gilmer County Bd. of Educ., Docket No. 95-11-197 (Aug. 1, 1995).

The next question is whether Grievant is entitled to any compensation for supervising the students while they were at the Dam. Grievant argued as a bus operator, he was only required to supervise students while they were on his bus. Respondent did not dispute this. Respondent denied that Grievant was required to supervise the students while they were at the Mud River Dam.

Mr. McCann testified that he had made the decision that the bus operators were to stay at the Mud River Dam with the students. Mr. McCann explained that students had never been taken to the Dam before, so he was not sure what to expect and wantedadditional adults on hand in case there was an emergency. Mr. McCann stated he did not direct that the bus operators supervise the

students.

Ms. Black obviously did not accurately relay the message as to what the bus operators' role was to be while at the Dam; nor did she have any authority to direct the bus operators to supervise the students. Because of this miscommunication, Grievant believed he was required to supervise the students while they were at the Dam, and did so; and LBOE received the benefit of this service.

However, Grievant is not entitled to any additional compensation as a supervisory aide. W. Va. Code § 18A-5-8 provides:

> (a) Within the limitations provided herein, any aide who agrees to do so shall stand in the place of the parent or guardian and shall exercise such authority and control over pupils as is required of a teacher as defined and provided in section one [§ 18A-5-1] of this article.
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> . . .
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> An aide designated by the principal under this subsection shall receive a salary not less than one pay grade above the highest pay grade held by the employee under section eight-a [§ 18A-4-8a], article four of this chapter, and any county salary schedule in excess of the minimum requirements of this article.

This Grievance Board has previously clearly set forth the standards for qualification as a supervisory aide, and Grievant's supervisory duties do not meet those standards, the first of which is that no certified professional personnel be present. Grievant failed to present any evidence on this, and there almost certainly were certified professional personnel on hand who were responsible for the Transition Program. Second, "[n]either Code § 18A-4-8a nor Code § 18A-5-8 mandates that an aide who performs supervisory duties on any occasion for any length of time receive the `supervisory' designation andadditional compensation. Rather, the language of the statutes suggest that these benefits are reserved for those aides who have been formally recognized by the county board or have otherwise been directed to perform such duties on a regular basis for significant periods of time." Norman v. Greenbrier County Bd. of Educ., Docket No. 96-33-263 (Apr. 15, 1997). Grievant's supervisory duties for a period of less than five hours on one day do not meet this requirement.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. A board of education may make trips which occur during the school day a part of a bus operator position, in addition to a regular morning and evening run. Pugh v. Hancock County Bd. of Educ., Docket No. 94-15-336 (Mar. 13, 1995); Fuchs v. Brooke County Bd. of Educ., Docket No. 92-05-047 (May 19, 1992).

3.

> Where a county board of education has a long-standing practice and policy requiring its bus operators to remain on standby status between their morning and afternoon bus runs to perform occasional uncompensated emergency driving or other additional driving during the regular work day, such work becomes part of the operators' work day, and not work for which additional compensation must be paid.

Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997).

4. Where the past practice in a four day summer program was not to pay drivers for making field trips which were part of the summer program and which occurred during the school day; and where Grievant was well aware of this practice when he and the otherdrivers agreed that he would make one of the field trips, and he had intended to stay the entire day; he had not signed an extracurricular contract, and he was aware the trip had not been separately posted for competitive bid as an extracurricular run; and he did not inform anyone that he expected additional compensation, Grievant knowingly volunteered to make the field trip without additional pay. Blankenship, supra. See also, Anderson v. Gilmer County Bd. of Educ., Docket No. 95-11-197 (Aug. 1, 1995).

5. W. Va. Code § 18A-5-8 provides that aides who act as supervisory aides be paid at least one pay grade higher than their highest pay grade classification allows.

6. Grievant was not acting as an supervisory aide.

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: February 8, 1999

Footnote: 1

Grievant's supervisor responded on August 24, 1998, that he had no role in the decision which resulted in the grievance. Grievant appealed to Level II, where a hearing was held on September 4, 1998. The grievance was denied at Level II on October 20, 1998. Grievant bypassed Level III, appealing to Level IV on October 21, 1998. A hearing was held at Level IV on January 8, 1999. Grievant was represented by Anita Mitter, and Respondent was represented by James W. Gabehart, Esquire. This matter became mature for decision on January 27, 1999, upon receipt of the last of the parties' post- hearing written arguments.

Footnote: 2

The record does not reflect that Grievant spent any additional time preparing or cleaning the bus or doing paperwork.