ROBERT McCLUNG,

Grievant,

v. **Docket No. 98-34-465**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Robert McClung (Grievant) is a bus operator employed by Respondent Nicholas County Board of Education (NCBE). He seeks to be paid a supplement of 50% of his daily pay for his extracurricular bus run.

This grievance was denied at Level I, on September 15, 1998, by Immediate Supervisor Bernard Lindsey. This grievance was denied at Level II, on or about November 10, 1998, by Superintendent's designee Jerry A. Wright, Esq. As authorized by W. Va. Code § 18-29-4(c), NCBE waived participation at Level III. A Level IV hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Beckley, West Virginia office on March 16, 1999. Grievant was represented by John Roush, Esq., and NCBE was represented by Erwin Conrad, Esq. The parties were given until April 16, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a bus operator employed by Respondent NCBE.

2. Grievant holds an extracurricular contract which requires that he be paid an additional twenty-five percent (25%) of his daily wages to:

> Transport to and from Nicholas County High School/Richwood Area to educational sites in the Craigsville/Richwood area as designated by the students [sic] program and assigned by the special education department.

> [Provide] [t]ransportation for the support of special education programs located in the Craigsville/Richwood area when necessary.

3. Grievant's extracurricular duties consist of picking up a special education student and transporting him to the Nicholas County Vocational Center (Vocational Center). Grievant waits, without other duties, at the Vocational Center for approximately three hours, and then transports that student to the Nicholas County Sheltered Workshop (Sheltered Workshop), which is located approximately five miles from the Vocational Center. Grievant then drives to the Vocational Center to drop off a special education aide, and remains there until he retrieves the student from the Sheltered Workshop. Grievant's extracurricular run takes approximately 20 minutes. Grievant also makes a regular run each morning and afternoon.

4. Bus operator Wayne Sears (Sears) holds an extra-curricular contract which requires that he be paid an additional forty percent (40%) of his daily wages. His contract describes his extra-curricular duties with language identical to the language in Grievant's contract. 5. Sears' extracurricular duties consist of one run transporting two special education students, and a second run from Summersville to the Sheltered Workshop. He also makes a regular run each morning and afternoon.

6. Bus operators James Chapman (Chapman), Mark Osborne (Osborne), Steve Trescott (Trescott), and Trennie Cavendish (Cavendish), hold identical extracurricular contracts which require that they be paid an additional fifty percent (50%) of their daily wages to:

> Transport students to and from secondary schools to the Nicholas County Career and Training Center at Craigsville or other sites as designated by the students' programs and assigned by the principal of the school.

> Transport mid-day vocational programs to sites determined by the vocational director.

> Transport of the nursing program where possible.

Transport mentor students from secondary to elementary schools.

Transport students between elementary schools and the vocational center.

Transport Craigsville Elementary PM routes as a part of their vocational run.

7. Chapman, Cavendish, Osborne, and Trescott make considerably more extracurricular runs than Grievant. They are essentially at the beck and call of instructors at the Vocational Center who may need transportation to wooded areas for forestry students, to various hospitals for nursing students, to various manufacturing plants for construction work students, and to museums or exhibitions for art students. The operatorsalso make other extracurricular trips not included on Grievant's or Sears' schedules. Each of these four operators spends approximately five hours per day driving. Each of these four operators also makes a regular run each morning and afternoon.

8. On occasion, when Trescott and Chapman are each scheduled to drive a bus to the Vocational Center, and there are not enough students to require the use of two buses, they use only one bus, which they take turns driving. This is done, at the order of NCBE, to save fuel.

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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party

has not met its burden of proof. Id.

This grievance concerns the pay supplement Grievant receives for his extracurricular duties. “Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which includethe instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis[.]” W. Va. Code § 18A-4-16. See Carr v. Monroe County Bd. of Educ., Docket No. 98-31-342 (Dec. 15, 1998).

Grievant seeks the 50% extracurricular pay supplement received by bus operators Chapman, Cavendish, Osborne, and Trescott, arguing that NCBE's failure to pay him this supplement violates W. Va. Code § 18A-4-5b, which provides:

> [t]he county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article. These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.

It is apparently Grievant's interpretation of this provision that once extracurricular contracts are awarded to one bus operator at a particular rate of pay, the uniformity mandated by this statute means that all bus operators are entitled to the same rate regardless of the nature, number, and duration, of the bus trips covered by their extracurricular contracts. NCBE argues that this statute is flexible enough to permit varying wages for bus operators who have varying duties. NCBE's position is correct.

Prior decisions of this Grievance Board have held that W. Va. Code § 18A-4-5b is directed toward employees who perform similar work but receive dissimilar pay. Nelson v. Lincoln County Bd. of Educ., Docket No. 97-22-575 (Oct. 13, 1998); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb. 5, 1998); Ball v. Mason County Bd. ofEduc., Docket No. 96-26-135 (Aug. 30, 1996). See Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990); Weimer-Godwin v. Upshur County Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

It is not disputed that Grievant does not receive the same pay as other bus operators who drive extracurricular runs. Moreover, there are undeniable similarities in their duties. However, the

extracurricular contracts of Cavendish, Chapman, Trescott and Osborne call for them to perform bus trips which are obviously substantially different in number and duration than Grievant's.

Grievant's extracurricular duties consist of picking up a special education student and transporting him to the Vocational Center. Grievant waits, without other duties, at the Vocational Center for approximately three hours, and then transports that student to the Sheltered Workshop, which is located approximately five miles from the Vocational Center. Grievant then drives to the Vocational Center to drop off a special education aide, and remains there until he retrieves the student from the Sheltered Workshop. Grievant's extracurricular run takes approximately 20 minutes. Grievant also makes a regular run each morning and afternoon.

Chapman, Cavendish, Osborne, and Trescott make considerably more extracurricular runs than Grievant. They are essentially at the beck and call of instructors at the Vocational Center who may need transportation to wooded areas for forestry students, to various hospitals for nursing students, to various manufacturing plants for construction work students, and to museums or exhibitions for art students. The operators also make other extracurricular trips not included on Grievant's or Sears' schedules. Eachof these four operators spends approximately five hours per day driving. Each of these four operators also makes a regular run each morning and afternoon. Sears also makes one more extracurricular run than Grievant.

Under these circumstances, Grievant has failed to establish that he is performing similar assignments and duties to those performed by Cavendish, Chapman, Osborne and Trescott. (See footnote 1) Quite simply, they do more work than he does. Accordingly, Grievant has failed to establish, by a preponderance of the evidence, that NCBE is in violation of the pay uniformity requirements of W. Va. Code § 18A-4-5b.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, a 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. W. Va. Code § 18A-4-5b is directed toward employees who perform similar work but receive dissimilar pay. Nelson v. Lincoln County Bd. of Educ., Docket No. 97-22- 575 (Oct. 13, 1998); Pate v. Summers County Bd. of Educ., Docket No. 97-45-188 (Feb.5, 1998); Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996). See Harper v. Pendleton County Bd. of Educ., Docket No. 89-36-708 (Aug. 21, 1990).

3. Grievant failed to establish, by a preponderance of the evidence, that NCBE is in violation of the pay uniformity requirements of W. Va. Code § 18A-4-5b. Accordingly this grievance is hereby **DENIED.**

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

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated April 26, 1999

Footnote: 1

The fact that on occasion, when Trescott and Chapman are each scheduled to drive a bus to the Vocational Center, and there are not enough students to require the use of two buses, they use only one bus, does not materially alter this conclusion.