DORSEL FISHER,

Grievant,

v v.

DOCKET NO. 01-18-555

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dorsel Fisher, filed this grievance against his employer, the Jackson County Board of Education ("Board") on August 9, 2001:

> Grievant, a regularly employed school bus operator, grieves the Respondent's failure to pay the entire cost of his bus operator's physical which amount to $130.00. The Respondent has paid $65.00. The Grievant alleges a violation of West Virginia Code § 18A-2-10.
>
> Relief sought: Grievant seeks reimbursement for the full amount of $130.00.

The grievance was denied at level one by Grievant's immediate supervisor, Gary Samples, on August 16, 2001, and following a level two hearing on September 12, 2001, denied by Superintendent Ronald E. Ray on October 3, 2001. The Board upheld the findings of Superintendent Ray on October 18, 2001, and Grievant appealed to level four on October 29, 2001. The parties agreed to submit this matter on the record developed at the lower levels, and this matter became mature for decision on January 21, 2002, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant wasrepresented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented at level two by Delores Ranson, and at level

four by Howard E. Seufer, Jr., Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

April 26, 1990 letter from Henry Marockie, State Superintendent, to Mr. Carroll L. Staats, Superintendent, Jackson County Schools, with attachments.

Board Exhibits

Ex. 1 -

Grievance statement and level one response.

Ex. 2 -

August 28, 2001 letter from Ronald E. Ray to Dorsel Fisher, with attached correspondence.

Ex. 3 -

Jackson County Schools Policy: Transportation - Physical Examinations.

Ex. 4 -

West Virginia Department of Education examining physician's form for Dorsel Fisher, with attached correspondence and medical records.

Ex. 5 -

West Virginia Department of Education examining physician's form (blank).

Ex. 6 -

March 7, 2001 letters from Jack Farra soliciting bids for school bus operators yearly physical examination.

Ex. 7 -

April 4, 2001 memorandum from Jack Farra to Gary Samples re: bids for physical examinations, with attachments.

Ex. 8 -

Diagnosis and fee chart from Dr. James G. Gaal.

Ex. 9 -

Contract between Durwood Gandee and the Board for medical services, dated April 27, 2001.

Ex. 10 -

Superintendent's Opinion dated March 4, 1987.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of Gary Samples.

FINDINGS OF FACT

After a detailed review of all of the testimony and evidence, I find the following facts have been proven by a preponderance of the evidence. 1. Grievant is employed by the Board as a regular bus operator.

2. Pursuant to current state law, bus operators must undergo annual physical examinations as a requirement for employment and certification as a bus operator.

3. Each year the Board solicits bids from area physicians to perform the required annual bus operators' examinations.

4. It is the practice of the Board to pay the cost of the physical performed by the successful bidder.

5. In the past, any employee who did not wish to have the Board-employed physician perform his or her physical could choose another physician to perform the examination and, the Board would reimburse that employee in full for the examination.

6. In the summer of 2000, the Board amended its practice, still allowing employees to choose their own physicians to perform the physical examination, but limiting the amount the Board would reimburse the employee to $20.00 over the dollar amount charged by the successful bidder physician.

7. For the 2000-2001 school year, bids from three physicians were received and reviewed. The

bids were:

Dr. Durwood Gandee - $ 45.00

Jackson Health Services - $48.00

Dr. James Gaal - 50.00

8. The Board awarded the contract to Dr. Gandee at the rate of $45.00 per exam. 9. The bus operators were notified that Dr. Gandee was selected to perform the annual physical examinations, and that the Board would pay only $65.00, or $20.00 above Dr. Gandee's bid of $45.00, toward any physical examination performed by another doctor. 10. Grievant scheduled an appointment with his personal physician, Dr. Gaal, to complete the required examination. Despite the fact that Dr. Gaal had submitted a bid to the Board to provide this service for $50.00 per employee, Dr. Gaal charged Grievant $130.00 for his physical examination.

11. Grievant submitted Dr. Gaal's bill of $130.00 to the Board for reimbursement. The Board reimbursed Grievant $65.00 for the exam, leaving a shortfall of $65.00.

DISCUSSION

Grievant has the burden of proving his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-27-476 (Mar. 28, 1996).
Grievant alleges the Board violated its own policy and W. Va. Code § 18A-2-10 when it refused to fully reimburse him for the cost of his physical examination. The Board argues it is authorized to limit the amount it reimburses its bus operators for their annual physical examinations to the amount charged by the independent contractor physician.

Grievant relies upon W. Va. Code § 18A-2-10, which provides:

> In case a medical or physical examination of any school board employee or qualified applicant who becomes an employee of the board for any school position is required by a board of education or by any administrator, department or agency of government which has authority to require such examination, the cost shall be paid in full by the employer.
>
> It shall be unlawful for any board of education to require any employee or applicant who becomes an employee of the board to pay the cost of any medical or physical examination as a condition of employment.

Grievant contends the "plain meaning" of the statute should control and is not open to

interpretation, and the statute requires the employer to pay the cost “in full.”

The Board agrees it must pay for physical examinations required of its employees, but relies on prior opinions from both the State Superintendent of Schools and this Grievance Board which approved the practice of placing reasonable limits upon reimbursement for fees charged by an employee's chosen physician.

In a direct response to the same question at issue here, the State Superintendent opined that a board of education has the discretion to reasonably limit the amount it reimburses employees for fees charged by a physician chosen by the employee, and may even limit the reimbursements to that amount contracted for by the board of education with the selected doctor(s). West Virginia State Superintendent of Schools Interpretations, dated April 19, 1983, and March 4, 1987. It has long been the rule of law that opinions made by the State Superintendent of Schools should be accorded great weight unless clearly erroneous. Smith v. Bd. of Educ. of County of Greenbrier, 192 W. Va. 321, 452 S.E.2d 412 (1994).

This Grievance Board also previously examined the issue, looking in particular at the language of W. Va. Code § 18A-2-10, and found that a county board of education may limit the amount it reimburses its employees for physicals performed by their chosen private physician to the amount charged by the independent contractor physician so long as said amount is not arbitrary. Melba v. Cabell County Bd. of Educ., Docket No. 06-87- 137 (Dec. 31, 1987). The holding in Melba was subsequently followed in Weaver v. Morgan County Board of Education, Docket No. 98-32-008 (May 6, 1998), where, in factsnearly identical to the instant grievance, the grievant declined to use the Board's contracted physician, and went to a physician of his own choosing for the physical examination. The Board reimbursed the grievant the amount he would have been charged by the Board's contracted physician, leaving a shortfall of $7.00.

Here, Grievant argues that Weaver is “a case of bad facts making bad law,” and is readily distinguishable from his case. In Weaver, the grievant refused to fill out the necessary forms for the contracted physician, who naturally refused to perform the physical. The grievant then went to a physician of his own choosing and submitted the fee to the county board. Grievant contends that, because Mr. Weaver refused to use the county board's physician because of inconvenience rather than matters of privacy, this is somehow an essential distinguishing factor. Additionally, Grievant mentions the fact that the shortfall in Weaver was “ridiculously small”, as opposed to the $65.00

shortfall at issue here.

The issue of an employee's privacy in choosing his or her own physician was precisely what prompted the earlier State Superintendent's Interpretations, resulting in the general rule that a county board can contract with a physician to perform physicals, but an employee retains the right to choose his own physician. The only limitation is the county board must only reimburse the employee the reasonable cost of the examination, which is generally held to be the bid cost submitted by the contracting physician.

With respect to the “ridiculously small” amount Mr. Weaver was ultimately responsible for, the undersigned finds this a distinction without a difference. The Board here was lawfully able to place a cap on the amount it would reimburse its employees whochose their own physicians, just as the county board in Weaver was, regardless of how little or how great that fee exceeds the contracted physician's fee.

Precedent on this issue is clearly established and the undersigned Administrative Law Judge does not believe the prior decisions of either this Grievance Board or the State School Superintendent to be clearly erroneous, nor have there been any subsequent rulings or changes in the law which would distinguish these opinions from this case.

In addition to the foregoing narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the burden of proof is upon the 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. School bus operators are required as a condition of their employment to have annual physical examinations. W. Va. Code § 18A-2-10.

3. A county board of education may retain the services of a physician as an independent contractor to perform physical examinations. W. Va. Code § 18A-2-10.

4. A county board of education may limit the amount it reimburses its employees for physicals performed by private physicians to the amount charged by the independent contractor physician. State School Superintendent Opinions, April 19, 1983, and March 4, 1987. Weaver v. Morgan County Bd. of Educ., Docket No. 98-32-008 (May 6, 1998); Melba v. Cabell County Bd. of Educ., Docket No.

06-87-137 (Dec. 31, 1997). 5. Grievant failed to prove by a preponderance of the evidence that the Board's actions in reimbursing its bus operators for physical examinations performed by doctors of its choice was contrary to law or 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 * County. Any 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 28, 2002