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**JALLETTA MOORE**

**v.**

**Docket No. 35-87-027-3**

**OHIO COUNTY BOARD OF EDUCATION**

**DECISION**

Jalletta Moore, grievant, is employed by the Ohio County Board of Education as a full-time bus operator. She filed a level one grievance in late 1986 alleging that school officials had improperly assigned supplemental runs to drivers less senior than she over a period of several years, such action violative of W.Va. Code, 18-4-8, W.Va. Code, 18A-4-8b and W.Va. Code, 18A-4-16. The grievance proceeded through the lower administrative levels with decisions adverse to grievant; after some delay due to scheduling problems, a level four hearing was conducted on April 8, 1987.<sup>1</sup> The parties submitted proposed findings of fact and conclusions of law, the last of which was received from grievant's WVSSPA counsel on June 9, 1987.

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<sup>1</sup>Reference to the November 26, 1986 level two hearing shall be cited as (T-1.\_\_) and to the April 1987 level four hearing as (T-2.\_\_).

The subject of this grievance, assignment of supplementary bus runs, is found in several concurrent grievances filed by other county school bus drivers although the matters in dispute differ somewhat.<sup>2</sup>

From the evidence adduced at the level two and four hearings of all of the grievances, it appears the Ohio County Board of Education has adopted the viewpoint of the State Superintendent of Schools stated in a September 26, 1986 advisory that "mid-day bus runs outside the bus operator's regular workday, which are driven on a daily basis... are neither regular nor extra duty (but are) supplemental bus runs...." A 1984 advisory states that the designation of a bus run as a supplementary run is determined by the county board of education. In accord with the 1986 advisory the contract for Ohio County bus operators states that regular runs are those which transport children to school in the a.m. and home in the p.m. and "[a]ll others driving for (Early Childhood Education) ECE, vocational students, (interschool) transfers... for instructional purposes, etc., between the morning and the evening run would receive supplemental pay."<sup>3</sup>

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<sup>2</sup>See, K. Billick, Docket No. 35-86-370-3; R. Duvall, Docket No. 35-86-371-3; C. Hewitt, Docket No. 35-86-372-3 (consolidated for hearing and decisional purposes); and R. Creighton, Docket No. 35-86-373-3.

<sup>3</sup>The advisories and grievant's contract are among several unmarked exhibits/documents found in the record of this or the related grievances, supra, at footnote 2. The respondent has relied on the advisories to advance its position on matters relating to the runs in question in Ohio County; some were not applicable and dealt with extra-duty work.

Thus, in Ohio County, supplementary runs for school bus operators are neither extra-curricular assignments as contemplated by W.Va. Code, 18A-4-16 nor extra-duty assignments, the allocation of which is determined by pertinent provisions of W.Va. Code, 18A-4-8b(b).<sup>4</sup> Grievant herein has advanced the theory that the runs in question were extracurricular assignments but the evidence suggests otherwise.

The more difficult question posed in this grievance and all of the concurrent bus driver cases is how and under what circumstances the runs should be allocated. The recent practice, since 1983, of the board of education is to first assign supplemental runs to drivers whose driving time for regular runs does not meet the 6 hour established workday. It maintains that any runs left over may then be meted to the other drivers in the manner agreed upon by them.

Grievant held an ECE run until 1983-84 when the transportation director began the practice of assigning ECE runs to fill the driving schedules of drivers less senior than grievant. It is uncontested that the junior drivers sometimes were shy only 15

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<sup>4</sup>W.Va. Code, 18A-4-16 describes extracurricular assignments as those which occur beyond the normal workday on an on-going, regularly scheduled basis while W.Va. Code, 18A-4-8b(b) defines extra duty assignments as those which occur on an irregular, occasional basis. The former assignments must be accomplished via a negotiated, agreed upon contract separate and apart from the employment contract, while the latter assignments must be awarded on a rotating seniority basis among the employees or an alternative agreed upon manner.

minutes or so of the requisite 6 hours but the runs could total an hour or more. The net result was that the junior drivers then had driving times in excess of grievant's or other senior drivers.

Grievant alleges that the practice is unlawful and relies on W.Va. Code, 18A-4-8b. She maintains that all jobs and assignments must be posted and in the case of supplementary runs, be assigned to the most senior driver desiring the run. Once assigned, she contends that the run must remain with the driver until it is relinquished or lawfully eliminated.<sup>5</sup> Grievant asks that supplemental runs not be wrongfully assigned to drivers to fill their schedules, but be properly posted for consideration by more senior drivers.

The statutes are silent as to this form of assignment, supplementary bus runs, peculiar to school bus operators. However, to justify the manner in which it assigns supplementary runs to drivers whose regular runs do not meet the established 6 hour workday, respondent relies on a 1982 decision rendered by the State Superintendent of Schools. In footnote 1 of the decision it states that a board, "may assign enough work to fill an

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<sup>5</sup>Grievant here relies on the "1983" law (as characterized by the drivers) that "the county board of education may not prohibit a service employee from retaining or continuing in his employment in any position or jobs held prior to... (1983) and thereafter." W.Va. Code, 18A-4-8b(b). (Emphasis added to denote the language supplementing the 1982 amendment to the statute creating the entitlement). This particular matter is more thoroughly examined in the Billick/Duvall/Hewitt decision. See, footnote 2, supra.

employee's normal workday." Respondent however, has taken the statement out of its proper context. In its proper context the board was counseled that it could not penalize (by salary adjustment or accumulation of driving hours "owed" to the board) a bus operator whose regular driving hours did not total those of the established workday. Nothing in the language of the decision empowers the board to make needed work assignments from supplementary bus runs which are to be awarded for "supplementary pay" as per the Ohio County bus drivers' contract.<sup>6</sup>

The board also relies on Carroll v. Ohio County Board of Education, Civil Action No. 82-C-730, decided in the Ohio County Circuit Court, June 10, 1985. However, that decision merely concurred with the decision of the State Superintendent and stated that when a driver bids on and is awarded an extra midday run or supplementary run, the board may reduce the compensation for the supplemental driving time to make up for any hourly shortage in the driver's regular run/schedule.

In addition to the foregoing, it is appropriate to make the following findings of fact and conclusions of law.

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<sup>6</sup>Footnote 4 of the (Nancy Carroll v. Ohio County Board of Education, July 22, 1982) decision counsels, "work loads must, of course, be fairly and reasonably distributed," citing Hawkins v. Board of Education, 275 S.E.2d 908 (W.Va. 1980). The workloads in the Hawkins case referred to extracurricular assignments, not supplementary assignments, and in any event, to deprive senior bus drivers of an opportunity to bid on supplementary work and income would not constitute the fairness or reasonableness as counseled by the superintendent.

### FINDINGS OF FACT

1. Grievant, Jalletta Moore, is employed by the Ohio County Board of Education as a full-time bus operator. A 6 hour workday for bus operators has been established by the board of education and serves as a basis for full-time employment and salary.

2. The respondent board has designated driving time beyond regular a.m. and p.m. runs transporting students to and from their curricular sites to be supplementary runs and, by contract, has established that such supplementary driving entitles the driver to supplementary pay at regular hourly rates.

3. Pursuant to a 1985 Ohio County Circuit Court decision, the bus drivers concede that when they bid upon and accept a supplementary run, any part of the assignment may be used to fulfill their 6 hour workday should their regular driving time fall short of 6 hours.

4. Uncontroverted evidence established that in recent years the board ignored its past practice and legal obligation to properly post job vacancies for all drivers to consider for bid when the total time for the newly created cumulative driving route exceeded the 6 hour workday (T-1. 5).

5. Testimony established that bus scheduling is difficult for the board of education due to fluctuation in enrollment for various schools and programs and the like. Being aware of those difficulties and for mutual benefit, the bus operators have agreed that variations in their regular runs and awards of supplementary bus runs could be scheduled just prior to school reopening on a year to year basis by the transportation director and not be made a part of their continuing contracts for full-time employment. The agreed upon practice and procedure for supplementary runs was that a list would be prepared with the drivers ranked by seniority. Those wishing a supplementary run are circled and available assignments are awarded on a seniority basis; drivers assigned a supplementary run then have a checkmark by their name (T-2. 14,15,16,18).

6. Grievant ranks 17th in seniority of all bus drivers who indicated a desire to receive a supplementary or ECE bus run for the current year. Some drivers near the top of the list did not receive a supplementary run while those below them (but above grievant) did. Three or more drivers less senior than grievant were assigned ECE or other supplementary runs; she, as well as other more senior drivers, were denied an opportunity to bid on or be considered for those supplementary runs.

7. Until 1983-84 grievant herein held an ECE run for extra compensation in addition to her regular run; at that time her run was taken from her and assigned to a less senior driver whose regular route had declined in order to fill his driving schedule to 6 hours. Other evidence indicates that the loss of grievant's ECE was the result of "bumping" by more senior drivers but it seems clear that whatever scheduling manipulation actually occurred, her loss was due to the practice of "filling" a newer driver's schedule to reach 6 hours. Grievant at that time made no formal protest to the action.

8. Contrary to their contract provision and without any agreement from the drivers, indeed, against their wishes, the transportation director has continued the practice of assigning supplementary runs to less senior drivers to fill their schedules even when total driving time then exceeds the 6 hour workday. The school board did not proffer any written policy regarding this practice, and in fact, no policy at all regarding bus operators.

9. At the level two hearing, grievant herein requested reinstatement to her ECE run and back wages, but modified that request at the level four hearing. At that time she stated that she would be satisfied with prospective relief in that all supplementary runs be taken from less senior drivers and in the future offered to all senior drivers (put up for "bid") for their consideration (T-2. 10).



## CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the assignment of school personnel but such discretion must be reasonably exercised and not in an arbitrary and capricious manner. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986); Gary Nelson v. Lincoln County Board of Education, Docket No. 22-86-116.

2. A six (6) hour workday has been established by the Ohio County Board of Education for its bus operators and every employee hired as a full-time operator with duties in excess of three and one-half hours is entitled to full-time wages. W.Va. Code, 18A-4-8a.

3. The Ohio County Board of Education has contractually defined and distinguished "regular" driving duties from "supplemental" driving duties and provides additional remuneration thereof for the performance of said supplemental runs.

4. The Ohio County Board of Education has chosen to award compensation to bus operators who drive supplemental runs and, absent the employees' agreement to the contrary, are bound by applicable school law in the dispensation, remuneration and/or cessation of all work assignments. Boyd Mayle, et al., v. Barbour County Board of Education, Docket No. 01-86-173-2.

5. Bus operators and Ohio County school officials have agreed to deviate from statutory requirements regulating certain work assignments, specifically the allocation of supplemental bus runs. The oral agreements entered into by the parties under existing school law empowering negotiation and agreements concerning supplementary employment such as extra-duty or extracurricular assignments are permissible, valid and enforceable. W.Va. Code, 18A-4-8b; W.Va. Code, 18A-4-16. See, Shirley Mullins v. Kanawha County Board of Education, Docket No. 20-86-222-1.

6. School officials are required to abide by the agreements and procedures entered into with their employees pursuant to W.Va. Code, 18A-4-8b and W.Va. Code, 18A-4-16, and must follow the agreed upon practices in a fair and consistent manner. Louise Isaacs v. Lincoln County Board of Education, Docket No. 22-86-104; Shirley Mullins v. Kanawha County Board of Education, supra.

7. The respondent board's practice relative to its school bus operators' work assignments not subjected to statutory requirements but instead negotiated between employer and employee for mutual benefit is permissible and valid if all components of the practice are agreed upon by the affected employees, and a unilateral modification by the respondent of contractual entitlement and employee agreement regarding the assignment of supplemental bus runs is arbitrary and void as a matter of law.

Accordingly, this grievance is **GRANTED** and the transportation director may schedule regular runs or other work assignments to fulfill a full-time operator's 6 hour workday, but may no longer assign supplemental runs to "fill" a bus driver's schedule; the supplemental runs must be offered to senior bus operators in the agreed-upon manner and procedure.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the court.

DATED:

June 30, 1987

Nedra Koval

NEDRA KOVAL  
Hearing Examiner