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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
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LUCIAN ISAACS, et al.

v.

DOCKET NO. 22-88-122

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

This action is brought by Lucian Isaacs, Alfred J. Mascal, Aubrey Dean, Jimmie Skeens, Willie Roy, Jack Sanders, Douglas Skeens, Donald R. Miller, and Samuel C. Clay, all school bus operators<sup>1</sup> employed by the Lincoln County Board of Education (hereafter, "BOE"). Grievants assert that they have been required

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<sup>1</sup> The Level IV grievance form lists "Lucian Isaacs et al." as grievant. On August 16, 1988, the parties submitted a written stipulation that the persons listed supra were the "original grievants." The Board must assume that these individuals have remained grievants through the administrative proceedings and are such at Level IV.

to make extra-duty runs, i.e., round trips from schools to one or more libraries on school days between 9:00 a.m. and 2:00 p.m.<sup>2</sup> for which they received no pay, in violation of W.Va. Code §§18A-4-5b,<sup>3</sup> 18A-4-8b<sup>4</sup> and other provisions of law.<sup>5</sup> Grievants request the payment of back wages<sup>6</sup> and the implementation of a county policy classifying all future "library runs" as extra-duty assignments per Code §18A-4-8b(b).<sup>7</sup>

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<sup>2</sup> While information on how frequently these trips are made is sparse in the record, one school has a library run each week, another, every two weeks, and a third, once a month. It would appear, then, that at least some grievants are required to drive for a library trip only a very few times per school year.

<sup>3</sup> In pertinent part, "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... ."

<sup>4</sup> The pertinent portion of this statute provides that extra-duty assignments (library runs in this case) shall be offered and not required based upon seniority, or distributed in some other fashion approved by BOE and two-thirds of the affected employees.

<sup>5</sup> At least one grievant, Mr. Isaacs, complains that his rights under Code §18A-4-8a were violated when a library run was changed from 9:00 a.m. to 12:30 p.m. without consent or even notice. §18A-4-8a provides that "[n]o service employee shall have his daily work schedule changed during the school year without his written consent... ." Clearly, §18A-4-8a was violated in this instance.

<sup>6</sup> Grievants' original request was for three years' back wages. However, when BOE raised the issue of timeliness of the grievance at the Level III hearing, grievants amended this request to one for just one year's back wages. BOE has not raised timeliness as a defense at Level IV.

<sup>7</sup> This request for change in policy is moot. See Finding of Fact #10, infra.

The instant grievance was filed at Level I, on April 4, 1988, and was denied by memorandum dated May 6, 1988. Relief was also denied at Levels II and III after hearings at each. The matter was submitted for decision on the record at Level IV with proposed findings of fact and conclusions of law from both grievants and BOE.

At Level IV, as it did at all previous levels, BOE defends its non-payment for library runs by reference to its Policy 12-12.02, which provides, in pertinent part:

**EXTRA CURRICULAR BUS TRIPS**

Extra curricular bus trips are defined as those trips which occur aside from the regular bus runs where students are transported to and from school. In the event that bus operators make additional trips beyond their regular runs, the bus operator would receive supplemental salary for such trips. Supplemental contracts between the board of education and the operator must be executed for all extra runs requiring supplemental pay.

A. The following guidelines and provisions shall apply for extra curricular trips requiring supplemental salary benefits to bus operators:

1. All drivers transporting students to the Vocational School shall be paid according to Lincoln County Board of Education Pay Schedule #16.

...

5. All runs made between 9:00 a.m. and 2:00 p.m. shall be paid at a rate of \$5.00 per hour, except Vocational School, County Field Day, County Testing, All-County Band, County Library trips, and other as approved by Assistant Superintendent of Instruction.

BOE contends that this Policy makes it clear that library runs are not subject to pay. It further argues that the Policy "was devised with the assistance of area bus supervisors and put on public review [at which time] there was no objection expressed by the drivers or anyone else." Level II Decision, May 19, 1988. At the Level II hearing, Mr. Steve Priestley, then Assistant Superintendent of Schools for Lincoln County, admitted that the area bus supervisors "sometimes serve" in a representational capacity for drivers "but not officially," T.13; however, he also asserted that "drivers at the time... that policy was implemented and developed by the...[BOE] did have some input...along with the area supervisors, into its formation." T.11.<sup>8</sup>

Although it appears to the Board that Policy 12-12.02, on its face, calls for compensation for library runs,<sup>9</sup> it is

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<sup>8</sup> At the Level II hearing, Mr. Isaacs admitted that "we [the bus operators] did agree that we would...take the field day" trip without pay. T.2. Two other drivers who testified but were unidentified by name stated they and the other drivers had agreed to work field days and/or basketball tournaments, but not library trips, gratis. T.3.

<sup>9</sup> Library runs fit squarely in the Policy definition of "extra curricular bus trips," and the Policy states that "the bus operator would receive supplemental salary for such trips." 12-12.02(A)(5) only provides that library trips are not to be paid at a rate of \$5.00 per hour, without further explanation of how they are to be compensated.

undisputed that this Policy has been applied over the past several years to deny payment for such runs. Grievants contend that this application was and is unjust, for the following reasons: 9:00 a.m. through 2:00 p.m. on school days is non-duty time for bus operators; certain runs other than library trips made during this time interval are compensated; and, the bus operators did not consent to the library runs, but were required to make them.

BOE conceded, at the Level III hearing, that the period from 9:00 a.m. to 2:00 p.m. on school days is unassigned, non-duty time for its bus operators. T.2. However, this general statement of county policy does not imply that regularly scheduled bus trips, e.g., vocational school runs, do not take place during this interval. Further, grievants at no time contended that the library trips were added to their schedules after the commencement of the 1987-88 school year.

The record does reflect that two types of bus runs made between 9:00 a.m. and 2:00 p.m. on school days, i.e., vocational school and out-of-county trips, are paid. Neither of these duties, however, appears similar to the library runs for purposes of this grievance. The nature of vocational education trips would dictate that they are true "extracurricular assignments" within the meaning of Code §18A-4-16,<sup>10</sup> not "extra-duty

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<sup>10</sup> "Extracurricular duties... occur at times other than regularly scheduled working hours... and... occur on a regularly scheduled basis."

assignments" as described in Code §18A-4-8b(b).<sup>11</sup> Additionally, there is no evidence that BOE does not uniformly compensate its drivers for out-of-county trips, or that it is unreasonable to differentiate such runs from those occurring wholly within Lincoln County.<sup>12</sup>

Assistant Superintendent Priestley, at the Level III hearing, admitted that BOE "doesn't pay drivers for [library runs]... and does require such [runs be made]" (emphasis supplied). T.11. Nothing in the record would indicate that any of the grievants directly consented to working the library trips,<sup>13</sup> or that Policy 12-12.02 was approved by "affirmative vote of two-thirds of the bus operators."<sup>14</sup>

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<sup>11</sup> "[E]xtra-duty assignments are defined as irregular jobs that occur periodically or occasionally... ."

<sup>12</sup> Such differential treatment has previously been at least tacitly approved by this Board. See Swiger v. Doddridge County Board of Education, Docket No. 09-88-092 (August 31, 1988).

<sup>13</sup> An argument could be made that, since grievants were making these trips for almost three full school years prior to filing the Level I grievance herein, they had implicitly consented to the situation. However, as noted supra at n. 6, BOE has not raised timeliness as a defense at Level IV.

<sup>14</sup> Since BOE admittedly required the extra-duty assignments be performed, the Board was forced to inquire whether or not the alternative procedure codified at §18A-4-8b(b), i.e., approval of a different method of making extra-duty assignments by BOE and two-thirds of the bus operators, had been utilized. The grievants presented testimony to the effect that it had not, and while the burden of proof never shifted away from grievants, the burden of production of evidence that a two-thirds vote had been obtained did shift to BOE. If this were not true, grievants would have been placed in the anomalous position of being required to prove a negative. See Lilienthal's Tobacco v. U.S., 97 U.S. 237 (1877); Hardman v. Cabot, 60 W.Va. 664, 55 S.E. 756 (1906). Since BOE failed to produce evidence of

(Footnote continued)

In addition to the foregoing, it is appropriate to make findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. Grievants are all bus operators employed by the Lincoln County Board of Education (BOE).

2. BOE general policy is that 9:00 a.m. through 2:00 p.m. on school days is unassigned, non-duty time for its bus operators.

3. Grievants have all been required to make "library trips," i.e., round trips from schools to one or more libraries, during the non-duty time referred to in Finding #2, supra. The frequency of these trips varies widely among the grievants.

4. Although BOE Policy 12-12.02, on its face, appears to provide for compensation for library runs, it has been consistently applied to deny payment to bus drivers for such runs.

(Footnote continued)

a two-thirds vote, the Board can only conclude such was never obtained.

The Board's decision today should not be intrepeted to generally hold that bus operators must be given opportunity to vote or even comment on county policy; the peculiar circumstances of this case, wherein BOE voluntarily placed Policy 12-12.02 upon public review and alleges such resulted in at least implicit approval by its bus operators, draw the alternative procedure of Code §18A-4-8b(b) into relevance.

5. Although not required to do so, BOE placed Policy 12-12.02 on public review prior to its adoption of the Policy.

6. Policy 12-12.02 was directly agreed to by four area bus supervisors, and perhaps by certain bus operators as well, but not by two-thirds of those operators or by any of grievants.

7. Certain runs other than library runs made between 9:00 a.m. and 2:00 p.m. on school days, i.e., vocational school trips and out-of-county runs, are paid. These paid trips are not analogous to library runs for purposes of this grievance, however.

8. All findings of fact presented supra apply to at least the past three school years, i.e., 1985-86, 1986-87 and 1987-88.

9. At the Level III hearing, grievants amended their remedy request from one for three years' back pay to one for just one year's back pay.

10. On August 16, 1988, BOE adopted a revised Policy 12-12.02, the relevant effect of which is that library runs and all other trips (with the possible exception of vocational school runs) made between 9:00 a.m. and 2:00 p.m. on school days, commencing school year 1988-89, are to be paid at a rate of \$5.00 per hour.

CONCLUSIONS OF LAW

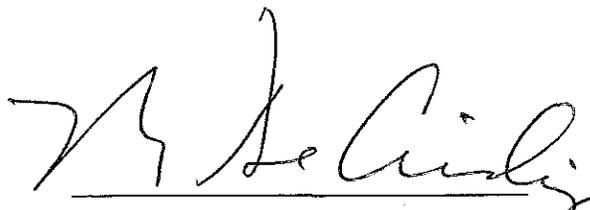
1. Library runs are "extra-duty assignments" within the meaning of W.Va. Code §18A-4-8b(b).

2. A county board of education must offer, and not require, extra-duty assignments to bus operators, in order of the operators' seniority, or distribute these assignments in some other fashion as approved not only by the board of education but also by an affirmative vote of two-thirds of the operators.  
Id.

3. In that BOE required grievants to make the library runs, Policy 12-12.02, at least prior to its August 1988 amendment, violated Code §18A-4-8b(b) since there was no affirmative vote of two-thirds of BOE's bus operators approving the Policy.

Accordingly, the grievance is **GRANTED**, and BOE is **ORDERED** to compensate grievants for all library runs made during school year 1987-88.

This decision may be appealed to either the Circuit Court of Kanawha or Lincoln County, but not more than thirty (30) days beyond its receipt. See W.Va. Code §18-29-7. The West Virginia Education and State Employees Grievance Board must be advised of any intent to appeal so that the record of this grievance can be prepared and transmitted to the appropriate Court.



**M. DREW CRISLIP  
HEARING EXAMINER**

Dated: 9/28/88