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**MICHAEL SWISHER, MICHAEL KELLY,
ELLEN SHAFFER and RANDALL BOLYARD**

v.

DOCKET NO. 39-87-266-2

PRESTON COUNTY BOARD OF EDUCATION

DECISION

Grievants, Michael Swisher, Michael Kelly, Ellen Shaffer and Randall Bolyard, filed a level one grievance on September 16, 1987 in which they alleged a violation of W.Va. Code, 18A-4-5b as they are not paid for extra duty assignments as are other drivers. The grievance was denied at level two and appealed to level four where an evidentiary hearing was held on February 2, 1988. At that time both parties agreed that the matter could be submitted for decision on the record supplemented with additional exhibits and proposed findings of fact and conclusions of law which were received by March 29, 1988.

The record indicates that at a meeting held on August 16, 1987 the Preston County Board of Education approved the grievants for employment as follows: Michael Swisher was assigned to the Valley attendance area which included the transportation to and from the Preston County Educational Center, the West Preston vocational students and the distribution of nursing students in the Kingwood area. Michael Kelly was assigned to the Central Preston attendance area including an express run to Central Preston Junior High School. Ellen Shaffer was assigned to the West Preston area including the transportation of special education students to and from the Preston County Educational Center to the Valley area. Randall Bolyard was assigned to the West Preston attendance area which included an express run to West Preston High School.

The positions had been posted on July 17 and the position descriptions included a statement of the extra duty each entailed. The grievants bid on the positions as posted, with apparently no coercion.

The grievants contend that other bus operators who perform additional assignments between their morning and evening runs receive supplemental pay as did the individuals who previously

held these positions. They argue that by denying them supplemental pay the board has violated W.Va. Code, 18A-4-5b which requires that employees performing like assignments be compensated uniformly. They do not believe that their application for and acceptance of the positions as posted constitutes a waiver of their statutory right.

The board of education concedes that other bus operators are awarded extra pay for mid-day runs similar to those made by the grievants who had accepted these runs as a whole unit without supplemental pay. The board denies that the employees contracts have been changed without their consent and asserts that none of the grievants work a full eight hour day.

In support of its action the board cites the case of Collins and Webster v. Wayne County Board of Education, Docket No. 50-86-368-1 in which similar assignments without supplemental pay were upheld and an interpretation of the State Superintendent of Schools dated January 21, 1987.¹ That interpretation was in

¹In Collins and Webster v. Wayne County Board of Education, supra, the grievants failed to demonstrate that they were performing like assignments and duties as those drivers receiving the additional compensation. In the present matter the board concedes the grievants are performing similar duties as employees who receive supplemental pay.

response to a question of whether a county which regularly employs drivers for morning and evening runs and then contracts with the drivers for mid-day runs could change that procedure to one of posting positions in categories which may or may not include mid-day runs. This procedure would continue the same supplemental pay as currently offered for the mid-day runs.

The response was negative based upon the relegation clause of W.Va. Code, 18A-4-8, however, the State Superintendent went on to say that new drivers may be assigned in the proposed categories under their regular contracts with no supplemental compensation and that such action would not violate the uniformity provision.²

The level two decisions indicate that the board wishes to discontinue its practice of offering supplemental pay to bus operators for runs additional to the morning and evening runs but which occur during the work day. While there are no statutory requirements that mid-day runs be awarded extra compensation, once it is awarded, W.Va. Code, 18A-4-5b requires

²The reasoning behind this interpretation was not available however, as it is written it is clearly wrong. When some drivers are paid for work that others are not there is a lack of uniformity of compensation as required by statute.

that it be paid uniformly. Phasing out supplemental pay would result in some individuals receiving additional pay for the same work which is done by other individuals who receive no additional pay. Although this situation would exist for only a limited period of time until the paid employees are eliminated through attrition, the lack of uniformity is prohibited for any period of time. Elimination of supplemental pay for mid-day runs will have to be achieved in a manner which will treat all affected employees in a uniform manner.

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

Findings of Fact

1. Grievants are employed as bus operators by the Preston County Board of Education.

2. In July 1987 several bus operator positions were posted. The description of the vacancies indicated that the runs would include duties additional to morning and evening runs.

3. The grievants were aware, or should have been aware from the position postings, that no supplemental pay was to be awarded for these positions.

4. The grievants applied for and accepted the positions as posted.

5. The board concedes that such mid-day runs are contracted separately to other drivers who receive supplemental pay for performing these duties.

Conclusions of Law

1. Uniformity shall apply to all salaries, rates of pay, benefits, increments or other compensation for all persons regularly employed and performing like assignments and duties. W.Va. Code, 18A-4-5b: Mayle, et al. v. Barbour County Board of Education, Docket No. 01-86-173-2.

2. As the board of education has chosen to award supplemental salary to some drivers who engage in mid-day runs all similarly situated employees, including the grievants, must be compensated uniformly.

Accordingly, the grievance is **GRANTED** and the board is hereby **ORDERED** to compensate the grievants commensurate with other drivers performing like assignments effective from the date they assumed the additional duties.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston 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 April 29, 1988

Sue Keller

SUE KELLER
HEARING EXAMINER