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REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

Members
James Paul Geary
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Orton A. Jones
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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

ROBERT TEREK

v.

Docket No. 35-87-276-3

OHIO COUNTY BOARD OF EDUCATION

DECISION

Robert Terek, grievant, is employed by the Ohio County Board of Education as a bus operator. On September 24, 1987 he filed a level one grievance alleging that he had been denied an extra-duty trip of his choice when he was wrongfully placed at the bottom of the rotating list of operators desiring an extra-duty bus run. The grievance was denied at the lower levels and appealed to level four in early November 1987. A hearing was conducted December 1, 1987 and briefs were submitted in early January 1988. A controversy arose between counsel for the parties over evidentiary matters and the parties appeared again by counsel for a post-hearing conference on January 20, 1988. The dispute was resolved at that time and corrected briefs were to be submitted but have not been tendered as of this date.

Initially, several county practices and requirements for bus operators must be examined in light of the grievance issues herein. The county has a written policy which governs the allocations of extra-duty runs for bus operators. Policy 2440 provides that a bus operator must sign up at the transportation office on Thursday for extra-duty runs during the following week, the work week being Monday through Sunday for purposes of the list. Bus operators with the most seniority will be given first priority and preference in accepting the known assignments for the following week followed by other fellow employees on a rotating basis until all employees have had an opportunity to select an assignment. Lastly, the policy provides for the employment of substitute bus operators should there be no regular bus operators available or willing to perform the extra-duty runs and it appears this option would be utilized most often when a needed run had not been submitted in advance and comes up after the Thursday selection day.

An unwritten agreement between the bus operators and transportation director supplemented the written policy and allowed a driver to decline an extra-duty trip and not lose his seniority position on the list under certain circumstances, to wit:

1) When the extra-duty trip was cancelled after the driver assignment was made, or

2) when the extra-duty run amounted to two hours or less, or

3) if the only available trips during Thursday's selection or later did not conform with the driver's required work schedule.

Bus operators must compile in-service time as part of their performance duties. Drivers with 30 hours scheduled driving time must accomplish a minimum of 42 hours of in-service credit during the 1987-88 school year. Drivers who have more than a six hour work day need more in-service time and must multiply their daily hours by seven to arrive at a total of needed in-service hours. A memo dated August 27, 1987 allocated certain days in which drivers could meet their minimum 42 hours for the 1987-88 term. August 27, 28 and 31, were designated as days in which a bus operator would attend meetings and other staff development activities to reach 18 in-service credit hours. June 6, 7, 8 and 9, 1988 were designated as days to provide the 24 additional in-service credit hours. Drivers who needed hours beyond 42 could satisfy the requirements by attending relevant in-service offerings but the memo stated that all in-service must be approved by the transportation director.

An earlier memo dated August 5, 1987 entitled "Bus Clean-Up" notified drivers that they could clean their buses after August 19, 1987 for the August 31 inspection and provided six hours credit for washing and waxing the bus windows, floors and seats.

Grievant herein elected not to clean his bus for the offered in-service credit while other operators who had to compile only 42 credits and who did clean their buses would thereby have the six hours of the June 9, 1988 allotted day already satisfied and drivers who needed time beyond 42 hours would have an opportunity to satisfy their additional requirements. Grievant did receive six hours credit for his September 19, 1987 attendance at an AIDS seminar and thus satisfied the June 9, 1988 allotted day but readily acknowledges he would not be entitled to further wages. He said he often gave his own time in June when the drivers have an annual "bus rodeo" for which in-service credit is given.

Next, a chronology of events upon which the grievance issues are predicated must be examined:

1. On Thursday September 10, 1987 grievant did not sign up for extra-duty driving for the week of September 14-20.

2. On Thursday, September 17, 1987 grievant did sign up to be considered for extra-duty trips the week of September 21-27. During the selection process on the 17th, no extra-duty runs were available that met with grievant's schedule, thus he was not placed at the bottom of the list. Also, on September 17, the transportation director's secretary informed the bus drivers that an AIDS seminar would be held on Saturday September 19, 1987 from 8 a.m. to 3:45 p.m. for anyone wishing to attend. Although not board sponsored, the AIDS seminar was considered work related and six hours of in-service time would be accorded to those attending. Later that evening grievant contacted another bus operator and they decided that they would attend the seminar together.

3. On Friday, September 18, 1987 the transportation secretary called grievant at home and asked if he would accept an extra-duty trip for Saturday, September 19 at 3:45 p.m. (grievant was not eligible because he had not signed up the previous Thursday). He told her that he could not take the run because he was attending the AIDS seminar that day and there was no further discussion.

4. On Monday, September 21, 1987 the transportation director informed grievant that his name had been placed at the bottom of the rotating seniority list for not accepting the extra-duty run on September 19, 1987.

5. On Thursday, September 24, grievant attended the meeting for bus drivers selecting extra-duty runs for September 29 through October 4, 1987. Normally he would have been sixth in priority, but because of the action on September 21, he was at the bottom of the list. When the sixth name was reached, the driver, Mr. Hostetler, selected the nine and one-fourth hour extra-duty run for the evening of October 3, 1987 that grievant would have selected had he remained in his previous seniority placement. When his turn came up, grievant selected an eight hour morning run on October 3.

Grievant contends that his removal from the list for refusing a bus run because he was going to attend a board approved seminar was contrary to on-going practice as per the unwritten driving agreement. He avers that the exception which permits a driver to refuse a run because of "work schedule" is not limited to a conflict of his regularly scheduled driving runs but also includes attendance at an occupationally related function such as West Virginia School Service Personnel Association meetings and in-service seminars as a participant or presenter showing safety films to school children. He claimed that the run he refused for September 19 was also turned down by several other drivers due to conflicts of "work schedule" other than their normal bus route.

Grievant asserts that some drivers got two extra-duty runs the week of September 28-October 4 as the list rotated back to the beginning. Since he could have accomplished both the morning and evening runs on October 3, grievant reasons, he should be paid for the evening run he was denied. Grievant relies on W.Va. Code, 18A-4-8b pertaining to alternative agreements for service personnel extra-duty assignments and W.Va. Code, 18A-4-5b mandating uniform treatment of employees. He asks for lost wages in the amount of \$144.33, including overtime, for the week of September 28-October 4, 1987.

The board disputes grievant's interpretation of the unwritten agreement and, alternatively, grievant's assessment of wages to which he would have been entitled for the week in question, September 28-October 4, had his name not been removed to the bottom of the list.

School officials admitted that work schedule conflict did include "approved" attendance at in-service functions but was generally granted to only those persons who needed hours beyond the 42 in-service hours provided in the 1987-88 schedule.¹ The unlikelihood of grievant being able to complete seventeen and one-fourth hours on-duty time on October 3, as the board suggests, has much more merit.

¹ This position appears arbitrary and unreasonable because the six hour credit allowed for the August bus cleaning relieved all 30 hour drivers needing 42 hours in-service from having to serve six hours in the June 1988 allotment. It would appear that school officials were not happy that grievant was the only driver who did not elect to wash his bus for six hours credit but then gained six hours credit by attending the AIDS seminar.

In addition to the foregoing narration, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant herein is employed as a bus operator on a 30 hour work week and must complete 42 hours in-service credit for 1987-88. Drivers who have more hours in their work week must attain additional in-service credits.

2. The bus operators and transportation department have written and unwritten regulations and agreements governing the allocation among operators of extra-duty driving assignments for extra compensation.

3. Grievant was mistakenly offered an extra-duty run during a week he was not eligible and the transportation director erroneously placed him at the bottom of the priority list for refusing the run notwithstanding grievant's attendance at an AIDS seminar for in-service credit the day of the scheduled run. At that time other drivers refused the run for similar reasons, but their names were not disturbed and attendance at seminars for in-service credit is a legitimate work schedule conflict/reason to refuse a run and not lose status on the drivers' priority list.

4. Due to grievant's placement at the bottom of the list, a Mr. Hostetler was ahead of grievant and selected a nine and one-fourth hour extra-duty assignment for Saturday evening October 3, 1987 to the Octoberfest at Oglebay Park which grievant desired. Grievant then selected an eight hour morning assignment for that day to the Octoberfest and, according to grievant, the two trips did not overlap.

5. Grievant did not substantiate that his name would have come up twice had he not been relegated to the bottom of the priority list nor did he substantiate that the two trips on October 3 would have been available if his name did come up twice as Mr. Hostetler may have alternatively selected the eight hour morning trip on October 3 if grievant had remained in his previous sixth place order and selected the nine and one-fourth hour evening trip.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-5b mandates uniform treatment of all employees and W.Va. Code, 18A-4-8b(b) specifies the procedure for assigning extra-duty trips including provisions for agreed upon alternative procedures and once alternative agreements are in place, a school board is required to abide by and uniformly apply the policies and practices it properly establishes to conduct school affairs. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977); Fisher v. Mercer County Board of Education, Docket No. 27-86-112.

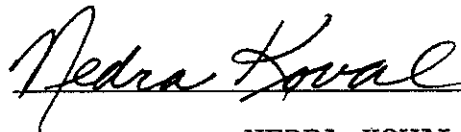
2. It is incumbent upon the grievant to prove every element of their grievance by a preponderance of the evidence. Edman v. Marion County Board of Education, Docket No. 24-87-255-2; Butta v. Ritchie County Board of Education, Docket No. 43-86-315-3; Harrison v. Kanawha County Board of Education, Docket No. 20-86-219.

3. Grievant has shown arbitrariness on school officials' part but has failed to prove entitlement to the relief of money damages in the amount he seeks and, absent express authority to do so, the West Virginia Education Employees Grievance Board cannot award damages of a punitive or speculative nature.

Accordingly, the grievance is **GRANTED** to the extent that grievant's name should not have been removed to the bottom of the drivers' preference list and he is entitled to only the difference in wages between the eight hour trip he completed and the nine and one-fourth hour trip he wanted but **DENIED** as to the requested wages of \$144.33.

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: April 4, 1988

A handwritten signature in cursive script, reading "Nedra Koval", written over a horizontal line.

NEDRA KOVAL
Hearing Examiner