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ROBERT M. TEREK and JULE KEREEKES

v.

Docket No. 17-88-012-3

OHIO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, Robert Terek and Jule Kerekes, are regularly employed by the Ohio County Board of Education as school bus operators on a 200-day employment term. On January 25, 1988 they filed a level four grievance alleging various statutory violations and improprieties on the board's part with respect to methods of assignments, rates of pay and use of substitute employees for the allocation of extra-duty driving. The grievance was set for hearing but cancelled upon the parties representation that the matter could be decided upon the record developed below. The parties indicated that they would submit stipulated facts and subsequently file proposed findings of fact and conclusions of law but no such materials have been received to date.¹

¹ The grievance was originally filed at level one May 20, 1987 and an adverse decision was rendered May 27. A level two appeal was filed June 2 and heard June 10, 1987; the parties agreed to waive timeliness and the grievance was denied December 11, 1987. The school board reviewed the level two record and denied the grievance January 13, 1988.

The specific incident which gave rise to this grievance occurred when the grievants bid upon and were assigned to an extra-duty run which transported students from Wheeling Park High School to Charleston on April 15, 1987; the bus returned to the high school April 17, 1987 and involved a total of 24 paid driver hours. The crux of the dispute involves the wages grievants earned for this extra-duty work and similar assignments and spills over into other matters involving the employment of bus operators for these assignments. In order to understand the grievants' complaint, some background information must be furnished.

The county's 1986-87 calendar illustrates the division of its employees 200-day employment term into ten (month) 20-day modules which overlap actual calendar months. Within each module certain days are designated as instructional days (180). There are six weekday calendar days coded "C, Schools Closed" which are not part of the 200 employment days for which employees are compensated. There are 20 additional non-instructional compensated days throughout the calendar: 2 Record Days, 1 Election Day, 6 Legal Holidays, 4 Continuing Education days, 3 In-Service Staff Development days and 4 Outside School Environment (OSE) days in which schools are closed. Grievants' extra-duty work on April 15, 16 and 17 involved a "regular" (instructional) workday (15th); an unpaid "Schools Closed" day (16th) and a paid OSE "closed" day when they would not transport students or report for work (17th).

The county has established a 6-hour work day for bus operators. In theory, when a regular bus operator bids for an extra-duty run that conflicts (overlaps) with his regular driving assignment, it follows that a substitute must be employed to complete the regular run. However, according to County Policy 2240, substitutes can be employed for extra-duty runs when all regular drivers "have had an opportunity" to choose a run and there are runs "left over" and/or all the regular drivers have refused certain runs. Bus operators unanimously agreed to this procedure in 1986. A substitute driver earns a flat hourly rate of \$8.60 when subbing for a regular run and \$6.20 for extra-duty runs. An extra-duty run also pays \$6.20 per hour to regular drivers even though the driver may have a higher per hour daily rate. In his level one decision the transportation director also noted:

Should the trip occur on a given holiday, then one and one half times is paid (\$9.30 per hour).

Should the trip occur on a day with a holiday in that given week, the \$6.20 is paid the first eight hours and \$9.30 over the eight hours.

Anything in excess of forty (40) hours, then time and one half of the driver's regular wages is paid.

When a regularly employed driver accepts an extra-duty run the board deducts the operator's daily rate already a part of his or her salary for each hour the extra-duty run encroaches upon the individual's regular work day and the method provides an actual means to pay only the \$6.20 rate for the overlapped time.

The board calculated grievant Terek's wages as follows (his regular hourly rate is \$10.62 and one and one-half times that rate is \$15.93): 13 hours x \$6.20 per hour to total \$80.60; 6 hours x \$9.30 per hour to total \$55.80; and 5 hours x \$15.93 per hour to total \$79.65 for a grand total of \$216.05. It deducted 3 hours regular wages, \$31.87, already paid for the regular run not completed for a net of \$184.19 for the trip wages. It appears the board credited the April 17 OES day as some type of holiday as it paid one and one-half times the extra-duty, extra-curricular rate for the 6-hour operator's work day and calculated 5 hours overtime on regular wages due to inclusion of the paid 6-hour OSE closed day in its computation of grievant's work week reasoning he had exceeded the 40-hour week by 5 hours.

The grievants contend the board's method and rate of payment to regular drivers for extra-duty runs for the overlapped hours is violative of their contractual status with the board. They believe they should be paid their regular wages for 6 hours completed work (the designated work day) whether the work is performed on their own routes or while driving an extra-duty run, some hours of which may overlap into their work day. Grievants assert that because the regular drivers presently lose a portion

of their regular hourly rate of pay when they accept an extra-duty run which overlaps into their work day, they consequently avoid bidding on these extra-duty runs which then leaves them open for substitutes. Grievants believe a substitute should be primarily hired for the regular driver's absented regular run as per W.Va. Code, 18A-4-15 and not be given opportunities to perform the extra run to the detriment of the regular drivers and the situation would be cured if the board properly paid the regular drivers their daily rate up to six hours when they performed extra-duty work which overlapped their work day.

Grievant Terek disagreed with the wages paid to him for the extra-duty run in question. He objected to the three hours of regular pay deducted from his April 15 work day and substituted with the \$6.50 rate for the three hours charged to the extra-duty run. He also stated the week of April 13-17, 1987 was a "holiday week" as the 17th was an OSE day and he should have been paid time and a half wages based on his regular wages for the extra hours beyond his work day that he worked on the 15th and for the April 17th holiday. He also asserts that the work performed on the 16th extended his 200-day employment term and he was due time and one half regular wages for that day in excess of the 200-day term and in excess of the normal day-holiday week. While grievants stated they would not pursue the payment of alleged backwages over the cited incident if the matter could

be resolved for future extra-duty runs, grievant Terek presented his version of how he believes he should have been remunerated for the trip. Grievant calculates that he is due \$150.23 in additional wages and reasons that he should have been compensated for the 24 hours extra-duty work in the following manner:

4/15/87	3	hours regular run rate @ 10.62 per hour	\$31.86
	2.5	hours in excess of normal day in a	\$39.82
		holiday week @ 15.93 per hour	
4/16/87	11	hours in excess of 200-day term	\$175.23
		and in excess of normal day-holiday week	
		@ 15.93 per hour	
4/17/87	7.5	hours at holiday rate @ 15.93 per hour	<u>\$119.47</u>
			\$366.38
		less p.m. run already paid	<u>-\$31.86</u>
			\$334.52

\$334.52 - \$184.19 remitted = \$150.23 additional wages due.

Relevant portions of W.Va. Code, 18A-4-8a upon which grievant relies in support of his position are as follows:

[T]he minimum monthly pay for each service employee whose employment is for a period of more than three and one-half hours a day shall be at least the amounts indicated in the "state minimum pay scale" as set forth in this section (full-time wages)....

Any service employee required to work on any legal school holiday shall be paid at a rate one and one-half times his usual hourly rate.

Any full-time service personnel required to work in excess of their normal working day during any week which contains a school holiday for which they are paid shall be paid for such additional hours or fraction thereof at a rate of one and one-half times their usual hourly rate and paid entirely from county board of education funds.

Grievant also cites W.Va. Code, 18A-4-8 which states in pertinent part:

Service personnel employed in the same classification for more than the two hundred day minimum employment term shall be paid for additional employment at a daily rate of not less than the daily rate paid for the two hundred day minimum employment term.

The board contends that a bus operator who accepts an extra-duty run overlapping the regular work day relinquishes his or her afternoon schedule for "volunteer" work and the regular run is then assigned to a substitute driver; that grievants' work on a closed non-school day on April 16, 1987 did not extend their 200-day contract; that the OSE day on April 17, 1987 was not a legal school holiday as defined by W.Va. Code, 18A-5-2; and the procedures used by the transportation director to hire substitute bus operators in any capacity are not violative of school law or any agreements entered into between the drivers and the board.

The weight of the law supports the grievants' position with respect to an obligation on the board's part to pay them their full day's wages for six hours work performed on a regular work day and the board cited no legal basis to support its theory that a driver "relinquishes" his right to the regular wages insured by statute to perform necessary work for the board for which a qualified, certified bus operator is required. The board's position is unreasonable as its cost for employing a regular driver at his regular wages for the overlapped time is minimal. For example, if grievant Terek had not bid for the extra-duty run the board would still be responsible for his three hours

wages, $\$10.62 \times 3 = \31.86 , and three hours to a substitute driving the extra run, $\$6.20 \times 3 = \18.60 , for a total of $\$50.46$. If it had correctly paid grievant his regular wages for the three hours, $\$31.86$, and three hours for the substitute hired to drive Terek's regular run, $\$8.60 \times 3 = \25.80 , for a total of $\$57.66$, the extra cost to the board for the three hours would have been only $\$7.20$. Using the board's payment methods changes matters. When it pays the regular driver, Terek for example, $\$6.20 \times 3 = \18.60 and the substitute $\$8.60 \times 3 = \25.80 for a total of only $\$44.40$, it shortchanged Terek $\$4.42$ per hour for three hours totaling $\$13.26$. However, drivers who have total driving assignments exceeding six hours may be required by the board to waive their regular wages for their extra-duty driving beyond the 6-hour established work day but they remain advantaged as they will reach overtime (40-hour week) much more quickly than drivers holding 6-hour contracts.

Conversely, the school board correctly reasons that legal school holidays have been explicitly stated in W.Va. Code, 18A-5-2 and an OSE day does not thus qualify. Therefore, one and one-half times a driver's regular wages must be paid for any work performed on Independence, Labor, Veterans, Thanksgiving, Christmas, New Year's, Memorial and Election Days and not for closed days in the school calendar. A related issue has already been addressed by the Grievance Board. If a bus operator works on any day

of his scheduled 5 day work week in excess of his or her normally worked day during a week containing a legal paid holiday, the operator shall be paid for such additional time at the rate of one and one-half times their normal (regular) hourly rate. Kerekes, et al. v. Ohio County Board of Education, Docket No. 35-87-130-3. With respect to the instant grievance the grievants did not perform extra-duty work on a legal holiday nor perform work in excess of their normal work hours on a regularly scheduled work day in a week containing a legal holiday and were due no extra pay derived from their regular wages on that basis.

The board has also correctly determined that extra-duty work performed on a non-work day within the school's calendar year does not operate to extend the employee's contractual employment term as the statute, W.Va. Code, 18A-4-8, essentially guarantees that an employee contracted for an employment period beyond the 200-day minimum, for example a 220-day employee, be paid his or her daily rate normally paid for the 200-day minimum employment term.

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

FINDINGS OF FACT

1. Grievants are regularly employed by the school board as bus operators with a 200-day employment term. The board has designated a six hour workday for its bus operators. Grievant Kerekes' total daily driving assignment exceeds the designated work day but grievant Terek's total daily driving assignment does not exceed the six hour day.

2. Grievants bid upon and performed an extra-duty run transporting students from Wheeling Park High School to Charleston. The trip began on April 15, 1987 a regular school day, and was extended over the 16th, a closed, non-school day and ended the 17th, a closed, non-instructional school day, OSE day. The work involved 24 driving hours.

3. Bus operators receive \$6.20 per hour for extra-duty employment but when their total work week exceeds 40 hours, time and one-half of the driver's regular wages are then paid for the extra hours over 40.

4. Substitute bus operators may be hired at a cost of \$8.60 per hour to fill the afternoon vacancy of a regular driver who has opted to drive an extra-duty run. Substitute bus operators also may be hired at \$6.20 per hour for extra-duty runs available after the regular bus drivers have exercised their right to bid upon the extra-duty runs.

5. The board's determination that a driver relinquishes his regular wages for extra-duty driving which overlaps or intrudes into the six hour designated work day is without legal or rational basis. The board's position is unreasonable as the cost to the board to employ the regular driver for the extra-duty work and pay the driver's regular wages up to the six hour established work day is miniscule.

6. Grievant Terek's determinations that he was entitled to time and one-half his regular wages for nearly the entirety of the extra-duty run in question is without legal basis as an OSE day is not a legal school holiday and work performed within the board's 200-day school calendar does not extend his contractual term beyond the designated 200-days.

7. For the extra-duty trip in question grievant Terek was paid in the following manner (his regular hourly rate is \$10.62 and one and one-half times that rate is \$15.93): 13 hours x \$6.20 = \$80.60; 6 hours x \$9.30 = \$55.80; and 5 hours x \$15.93 = \$79.65 for a gross total of \$216.05. Three hours regular wages, \$31.87, already paid for the regular run not completed was deducted for a net of \$184.19 for the trip. A proper method would have been to omit the deduction of \$31.87 and to instead cancel three hours at the extra-duty rate. The total would then be \$197.45 (10 x \$6.20 = \$62.00 + \$55.80 + \$79.65 = \$197.45) or \$13.26 more than it actually paid him. Grievant waived payment of owed wages for this particular incident should he prevail on the grievance issue(s).

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-8a provides that any service employee who is employed for more than three and one-half hours per day shall be paid full-time wages. Bengey v. Summers County Board of Education, Docket No. 45-86-056.

2. School boards are obligated to pay one and one-half times a service employee's regular wages for work performed on a paid school holiday or for any assigned work extending beyond the employee's regularly scheduled work day during a holiday week. Kerekes v. Ohio County Board of Education, Docket No. 35-87-130-3.

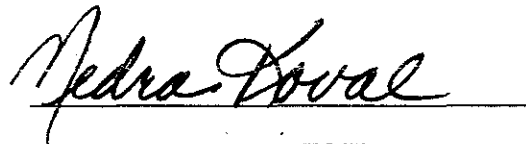
3. Thirteen paid non-instructional school days on the county's school calendar may or may not require that specific employees perform a duty or report to work but those days cannot be construed as holidays, legal or otherwise, as legal school holidays are statutorily defined as Independence, Labor, Veterans, Thanksgiving, Christmas, New Year's and Election Days. W.Va. Code, 18A-5-2.

4. Extra-duty work performed by a service employee for an agreed upon wage which falls on a day not included in a school board's school calendar, whether weekday or weekend, but is within the defined 200-day employment term does not constitute an extension of the employee's 200-day employment term as contemplated by W.Va. Code, 18A-4-8.

Accordingly, the grievance is **GRANTED** but only to the extent that the school board is Ordered to pay its regular bus operators their normal hourly rate up to the six hour established work day when the driver elects to turn over his regular run on any scheduled work day to a substitute driver in order to perform an extra-duty driving assignment. The grievance is **DENIED** with respect to grievants requests regarding holiday pay and payment for work beyond the 200-day work term.

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: July 20, 1988

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

NEDRA KOVAL
Hearing Examiner