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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.
Governor

MICHAEL WASS

v.

Docket No. 43-87-206-3

RITCHIE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Michael Wass, is employed by the Ritchie County Board of Education as a school bus operator. On May 18, 1987 he filed a level one grievance alleging a violation of W.Va. Code, 18A-4-8b when he was not selected to serve as a second driver when students were taken (one bus) on an extended trip to Gatlinburg, Tennessee. A June 25, 1987 level two decision was adverse to grievant and the school superintendent would not process grievant's level three appeal due to "improper filing." A level four appeal was filed July 17, 1987. Several hearings were scheduled and continued by the parties in August 1987. Grievant's counsel notified the respondent and the undersigned that she would consider submitting the matter for decision based on the record after she received and reviewed the level two transcript. The transcript was received in the Wheeling Office August 29, 1988. As new counsel was appointed to represent the grievant,

the case was rescheduled for September 22, 1988 and a brief proceeding ensued to supplement the record developed below. Proposals were filed by the parties on October 11 and 14, 1988.

The class trip to Tennessee in May 1987 involved between 20 and 30 students of a Ritchie County High School learning disabilities (LD) class. A determination was made by school officials that only one bus and one driver was needed. The bus operator due for extra-duty consideration, Barbara Amos, was selected to serve as the trip bus driver and Earl Flesher, a regularly employed bus driver who claims to also serve as an aide for LD students, accompanied the group as their aide. Grievant was next on the drivers' extra-duty list after Ms. Amos while Mr. Flesher was nowhere near consideration for an extra-duty driving assignment on the drivers' rotational list.

While Mr. Flesher may not have anticipated serving as a driver on the trip, as matters transpired, Ms. Amos did ask that he relieve her for several miles on the trip down and once coming back when her eyes were bothering her. Mr. Flesher testified that he did not receive extra compensation for serving as an aide on the trip but took personal leave days to go on the trip. According to his testimony, he ultimately received what amounted to less wages than his regular pay for the period in question.

Grievant attacks all aspects of the board's use of Mr. Flesher and argues that such "shenanigans" serve to violate the law intended to protect service employees on such matters as compensated extra-duty assignments. W.Va. Code, 18A-4-8b(b) provides that service employees must be considered for extra-duty assignments on a rotating seniority basis.

Grievant contends the board usually appointed two drivers to serve on class trips involving extensive driving and challenges the board's appointment of Mr. Flesher as an aide. Grievant maintains that Mr. Flesher had to drive the bus to relieve Ms. Amos; thus Flesher was utilized as a driver even though purportedly serving as an aide. Further, if an aide's presence was necessary for the trip, no other aide than Mr. Flesher was considered for the trip and an aide seniority list was not considered in the selection. Grievant questions other circumstances involved in Mr. Flesher's assignment. He relies on two State Superintendent advisories which state a service employee may not volunteer to work without pay or do work for a board of education for compensation when on vacation. For relief in this grievance, grievant requests the extra-duty wages which he would have received had he not been wrongfully denied an assignment as a necessary second driver.

The respondent denies impropriety on its part in this matter but only with respect to the issue of whether or not two drivers were needed for the trip. School administrators testified that given certain circumstances such as age, type and number of students to be transported, distance to be traveled, time span the activity is to occur and the amount of chaperones scheduled to help with the students, two drivers might be appointed to serve as operators

but the Tennessee trip only required one driver. It was suggested that the sponsoring group could not have taken the trip had it been required to pay the additional expense of two drivers.

The board's position in this matter cannot be upheld as persuasive authority supports grievant's contention of impropriety on the board's part when it approved Mr. Flesher's leave of absence to serve as an unpaid aide for the trip in question. While Mr. Flesher did receive wages for the period in question, he waived the extra-duty pay to which he was entitled. Further, as the State Superintendent states in his advisory, "the employee is either on paid leave or at work -- but not both." Finally, the evidence demonstrates that a second driver was necessary to relieve the fatigue of the sole driver assigned. Grievant herein was next on the bus driver's rotation list and should have been selected pursuant to W.Va. Code, 18A-4-8b(b) to serve as a back-up driver for Barbara Amos.

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

FINDINGS OF FACT

1. Grievant is employed as a bus driver by the respondent board of education. Earl Flesher is a regularly employed bus driver who asserts that he is additionally employed as an aide serving learning disabled (LD) and other exceptional students. However, a document signed by the State Superintendent of Schools

indicates that as of the second month of the 1986-87 school term, the respondent county certified that Mr. Flesher was classified as a 6-hour per day Bus Operator at Pay Grade D on a 200-day term. (Joint Exhibit No. 2, 9/22/88).

2. In March 1987, teacher sponsors of a high school LD class requested permission to take a six-day bus trip with their students to Tennessee in May and asked that Earl Flesher accompany them as an assigned driver, "aide/driver."

3. The bus drivers' extra-duty rotation list indicated Barbara Amos was next in line for a driving assignment followed by grievant herein.

4. Past practice of the board has been to assign two drivers to an extended extensive bus trip but in this case only Ms. Amos was assigned to drive while the board approved Earl Flesher's leave of absence to voluntarily accompany the students on the trip as an aide.

5. Due to the extended driving and other stops necessitated in the care of twenty or more LD students, the bus trip took over ten (10) hours from its departure in the county to its final destination in Gatlinburg, Tennessee. A second driver, Mr. Flesher, was needed to spell Ms. Amos while enroute to Tennessee, for at least one side-trip while there and for a portion of the trip back home.

CONCLUSIONS OF LAW

1. The State Superintendent of Schools has determined that school service employees may not volunteer their services without pay or work for their board of education while on vacation.

2. Interpretations of the State Superintendent of Schools are persuasive authority and entitled to great weight unless clearly erroneous. Smith v. Board of Education of the County of Logan, 341 S.E.2d 685 (W.Va. 1985); Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1; Smith v. Wyoming County Board of Education, Docket No. 55-87-209; Talerico v. Harrison County Board of Education, Docket No. 17-88-021-3.

3. An interpretation of the State Superintendent of Schools involving a claim of entitlement to compensation arising under school laws or policy will be applied unless clearly wrong. Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1; Stutler v. Wood County Board of Education, Docket No. 54-86-333-3; Varney v. Logan County Board of Education, Docket No. 23-86-374-1.

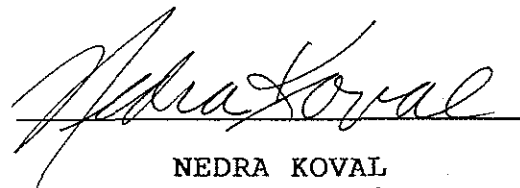
4. The board of education herein improperly permitted a bus driver to take personal leave to volunteer his services as an aide when his services were needed and utilized as a second bus driver.

5. Grievant herein was denied an extra-duty assignment pursuant to W.Va. Code, 18A-4-8b(b) as a result of the improper aide assignment.

Accordingly, the grievance is GRANTED and the Board is Ordered to pay grievant lost wages for the trip at issue.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie 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: October 31, 1988


NEDRA KOVAL
Hearing Examiner