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

v.

Docket No. 04-88-251

BRAXTON COUNTY BOARD OF EDUCATION

DECISION

Grievant Jeffrey Dennison is employed by Respondent Braxton County Board of Education as a bus operator. He filed this grievance at Level I on October 28, 1988, and after denials there and at Level II and waiver at Level III, at Level IV, where it was heard January 27, 1989. The parties agreed to submit proposed findings of fact and conclusions of law by February 20 and the case is thus mature for disposition.

Grievant's complaint is as follows:

In August of 1985 in a regular Board of Education meeting I, Jeff Dennison, was given a regular run without the construction class on it. In September of 1985 in a regular board meeting a construction class was added to my run, without compensation, which was in violation of school laws (18A-4-8a)¹ and (18A-4-5b).

¹ Grievant has expressly abandoned any claim based on W.Va. Code §18A-4-8a.

The construction class, electrical class and the nursing class are all vocational classes. The electrical class and the nursing class are paid runs, but the constructional class is not. This is in violation of school law (18A-4-5b). I, Jeff Dennison, should be compensated for the days I have run without pay.

Two bus drivers were removed from rotation of the construction run because of school area. I also serve a school that is some distance from the mid-day run's starting point. In a board meeting it was stated by the Board of Education members and by Dr. Seal that all new runs would be put on rotation. This is in violation of state law (18A-4-5b). (18-29-2).

Relief I am seeking is compensation for the days I have driven without pay and removed from rotation of the construction class.

Building construction is a class offering in the vocational curriculum at Braxton County High School (BCHS). Students in this program are transported virtually every school day from BCHS to their work site, which is always within ten miles of BCHS. These young people actually build homes and, while their work site changes, it does not do so more often than every one-and-one-half to two years, the period of time it takes them to complete a project. Prior to 1977, the class was taught at BCHS; since then, it has met off-campus, as explained immediately supra. In 1977, Mr. Michael Corliss, the class's instructor, became certified as a bus operator and provided his students, without additional pay, transportation to their work site via a county school bus. Regularly-employed bus operators grieved this arrangement, which resulted in Mr. Corliss's being relieved of driving and that duty's being added to the

operators' normal schedules. See Crites v. Bd. of Educ. of the Co. of Braxton, State Supt. Schools, Oct. 31, 1984.²

According to the unrefuted evidence at Level IV, since October 31, 1984, the construction runs³ have been considered part and parcel of certain drivers' regular assignments, and have never been subject to extra pay. Dr. Kenna R. Seal, Respondent's Superintendent of Schools, testified that as bus driving runs have been vacated since October 31, 1984, duties related to serving the building construction students have been added to job descriptions except those with morning schedules terminating in the Burnsville or Frametown area. These two areas are excluded because of their distance from BCHS and the number of "deadhead" or no-passenger miles and the attendant cost to Respondent if the drivers were required to participate in transporting construction students. Presently, thirteen of Respondent's thirty-eight drivers share woodpecker run responsibilities; Grievant's commitment thereto requires him to put in two-and-one-half hours every eighth workday.⁴ Seal denied that

² Prior to July 1, 1985, when this Grievance Board assumed jurisdiction for education employee grievances, the State Superintendent of Schools was the final administrative arbiter of such complaints.

³ Bus operators in Braxton County have nicknamed building construction students "woodpeckers" and therefore refer to the construction run as the "woodpecker run." See Grievant's Exhibit 1.

⁴ Eight drivers, including Grievant, provide
(Footnote Continued)

he had ever stated that construction duties would be added to all new runs; nor was such action ever planned, according to him.

Grievant, who has been permanently employed by Respondent as a driver since approximately 1984, bid on his present run in early August 1985. The job vacancy posting, a part of Respondent's Exhibit 2, provided the following job description, in pertinent part:

Frametown area (Express Handicap from Frametown to Sutton) and transporting students from Braxton County High School to building sites within the county.

Grievant testified that he had been told by Dr. Seal and Respondent's Support Services Director Rogers, at the time he placed the bid, that the woodpecker runs should not have been listed and were not actual requirements of the job. Respondent denied that Grievant was ever told this, but admits that the construction duties should have been excluded from the job description since the other part of the run ended in Frametown. Grievant was advised in late August 1985 that his transfer to the new position would be rescinded and the job re-posted with an accurate description; however, at a September 3, 1985, regular meeting of

(Footnote Continued)

transportation to the building site, and five other operators return the students to BCHS. It is difficult to understand why Grievant is occupied for two-and-one-half hours each time he makes the woodpecker run; nevertheless, this was what was revealed by the evidence at Level IV.

Respondent, he agreed to accept the run as originally advertised, and Respondent acceded to this. Grievant admitted that he wanted this run for a number of reasons, including that his children were served by it and that his expense getting to and from work would be less than in his previous assignment. He has continued to make the construction run as a part of his regular duties since the commencement of the 1985-86 school year.⁵

Respondent argues that both the electrical and nursing runs are, or were, so intermittent as to be extra-duty assignments per Code §18A-4-8b(b) and not otherwise "like" the construction runs. The uncontroverted evidence is that the electrical class, prior to the Level IV hearing in this case, had been out only four times during school year 1988-89, and that this frequency had been typical at least since 1976; as for the nursing class, which was phased out after 1986-87, it never left BCHS more than a few times per school term and, toward its end, the instructor transported her students in a private automobile. Respondent has consistently treated electrical and nursing runs as extra-duty and has accordingly paid bus drivers supplemental wages for making them.

⁵ Apparently beginning 1988-89, Grievant's run was altered to end in Gassaway. This is not only better for Respondent and its students, it facilitates Grievant, whose schedule includes an after-duty part-time job at the Western Auto Store in Gassaway.

In Crites, the State Superintendent of Schools found the construction runs to be neither extra-duty per Code §18A-4-8b(b) nor extracurricular per Code §18A-4-16. No information has been presented to this Grievance Board which would upset that determination. Superintendent Truby further expressly found that the construction runs could appropriately be considered a part of a bus operator's regular duty schedule. Id.

Code §18A-4-5b provides, in pertinent part:

[U]niformity 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.

Code §18-29-2(m) provides:

"Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

Code §18-29-2(o) provides:

"Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

At the Level IV hearing, Grievant limited any claim of discrimination or favoritism to one related to the geographic assignments of drivers. More specifically, he complains that he was required to make the woodpecker run when his morning duties ended at Frametown, although other operators driving to Frametown or other areas did not make the construction run. Further, Respondent's bus driver Charles Ledbetter's 1988-89 schedule was changed during Summer 1988 to exclude the woodpecker run, since his morning

run concluded at Burnsville, some thirteen miles from BCHS. Grievant is approximately 10.6 miles from BCHS at the point where his last student disembarks before his construction run begins. He was aware prior to September 1988 that Ledbetter had been released from his construction run; the other of the "two bus drivers" referred to in the grievance statement, J. Bragg, was never assigned this duty according to unrefuted testimony at Level IV. Bragg, like Ledbetter, has at least since the commencement of school year 1988-89 ended his morning run at Burnsville.

Also at Level IV, Respondent raised the issue of timeliness per Code §18-29-4(a), which provides, in pertinent part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant. . . shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

. . . .

Within ten days of receipt of the response from the immediate supervisor. . . , a written grievance may be filed. . . .

Grievant responded that even though he has been making the construction run since 1985, he continues to have that responsibility and thus, Respondent is engaging in a "continuing practice" making this complaint timely under §18-29-4(a). He apparently further contends that the 1988-89

Bragg-Ledbetter situation gives rise to a related but separate grievance that is clearly timely.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Jeffrey Dennison is employed as a bus operator for Respondent Braxton County Board of Education.

2. Mid-day construction class runs are made virtually every school day in Braxton County and are covered, on a rotating basis, by thirteen of Respondent's thirty-eight drivers. Electrical class runs are made intermittently mid-day, as were nursing class runs prior to that program's phase-out after 1986-87.

3. All runs assigned since October 31, 1984, save those terminating in Burnsville or Frametown, have included construction class responsibilities. The Burnsville and Frametown runs are exempt in that Respondent has determined it is not cost-effective to add the construction duties thereto. The only exception is the run Grievant was awarded prior to the 1985-86 school year, which ended in Frametown. In that circumstance, Grievant voluntarily and knowingly agreed to assume construction run duties, and Respondent allowed this for reasons including Grievant's personal situation.

4. As a part of his regular duties since 1985-86, Grievant has been required to transport building construction students from Braxton County High School to an off-campus site every eighth workday. This construction, or "woodpecker," run consumes approximately two-and-one-half hours.

5. Sometime prior to the commencement of school year 1988-89 for students, Grievant became aware that bus operator Charles Ledbetter had been relieved of construction run duties and that driver J. Bragg had never received such an assignment. During school year 1988-89, both Ledbetter and Bragg have concluded their morning runs at Burnsville.

6. Grievant conferred, or attempted to confer, with one or more superiors after school started for students in 1988-89, and formally filed his Level I grievance October 28, 1988.

CONCLUSIONS OF LAW

1. "Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance," a grievant must initiate a conference with his or her immediate supervisor to discuss the matter. A Level I grievance may be submitted shortly

thereafter, if the problem remains unsettled. W.Va. Code §18-29-4(a).

2. The term "practice," as used in the phrase "continuing practice" in §18-29-4(a), implies affirmative activity on the part of the employer. See Van Dyke v. McDowell Co. Bd. of Educ., Docket No. 33-88-098 (Oct. 18, 1988) (grievant who failed to object to imposition of duties for over a year, or show a valid reason for delay in filing complaint, unentitled to relief).

3. Insofar as this grievance concerns Grievant's September 1985 assignment, it is clearly untimely since no continuing practice has been shown and no other basis for meeting the timeliness requirements of the statute has been established. Grievant's claim regarding the assignments of Ledbetter and Bragg is one of lack of uniformity, favoritism and discrimination and is found to be timely.

4. A county board of education in West Virginia has substantial discretion in the assignment of its employees; however, it must exercise this discretion in a fair and not arbitrary or capricious fashion. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

5. Personnel in the same category and performing the same duties must be treated as uniformly as possible with regard to certain particulars of employment. Code §18A-4-5b; see Skeens v. Roane Co. Bd. of Educ., Docket No. 44-88-006-1 (Oct. 26, 1988).

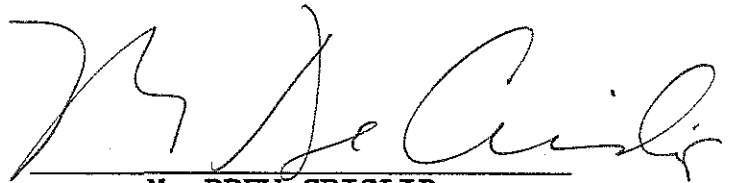
6. The construction runs in this case are made daily and thus are not extra-duty assignments per Code §18A-4-8b(a), as are electrical runs and as were nursing runs. Thus, it is appropriate for Respondent to handle construction runs as dissimilar to the latter two. See Mayle v. Barbour Co. Bd. of Educ., Docket No. 01-86-173-2 (Mar. 3, 1987).

7. It is reasonable for Respondent to include construction runs as a part of certain of its bus operators' regular assignments. Crites; also, see Collins v. Wayne Co. Bd. of Educ., Docket No. 50-86-368-1 (Aug. 20, 1987), aff'd., Cir. Ct. Wayne Co., W.Va., C.A. No. 87-C-441 (Nov. 23, 1987). Further, Respondent's determination that it is not financially practical to require all operators to assume construction run responsibilities is not violative of the uniformity mandate of Code §18A-4-5b. See Cole v. Putnam Co. Bd. of Educ., Docket No. 40-88-240 (Mar.17, 1989).

9. Grievant has failed to demonstrate any discrimination or favoritism by a preponderance of evidence in this case. See Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

Accordingly, this grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Braxton County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP
HEARING EXAMINER

DATE:

March 17, 1989