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**BUREN PAYNE and
NORMAN LILLY**

v.

Docket No. 10-88-213

FAYETTE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, Buren Payne and Norman Lilly, are employed by the Fayette County Board of Education (Board) as bus operators. Both filed grievances on or about November 3, 1988 alleging the Board had assigned them uncompensated bus runs in violation of W.Va. Code §18A-4-8b(b). The grievances were consolidated at Level II and a decision following a hearing held October 19, 1988 was adverse to the grievants. The Board did not conduct Level III proceedings and a Level IV hearing was held December 5, 1988.¹

¹The parties submitted the transcript of the Level II hearing (T2.) and supplemented that record with several documents.

At the Level IV hearing the Board objected to the consideration of Mr. Lilly's grievance on the grounds he had not made a timely appeal following the Level II decision. An examination of the record revealed that only Mr. Payne's Level II appeal form had been received.² Mr. Lilly testified that he completed the required form on November 13, 1988 and deposited it in the mail on that same date and could only conclude that it had been misplaced or lost by the postal authorities. Upon consideration of the credibility of that testimony and the fact that the grievances were consolidated without objection at Level II, the Board's motion to dismiss Mr. Lilly's grievance is hereby **DENIED**.

The facts giving rise to the grievances are undisputed. The grievants report to their respective stations at 6:00 a.m. and begin their morning runs at approximately 6:30 a.m.³ Those runs are completed at approximately 8:30 a.m., at which time both return to their stations. The grievants report back to their stations at approximately 1:50 p.m. and complete their evening runs at approximately 3:50 p.m. Several days prior to

²A similar examination of files in the Charleston office of the West Virginia Education and State Employees Grievance Board, where Level IV appeals are initially logged, was made prior to the hearing with the same result.

³Grievants generally serve in the same geographical area of the county and it appears that their regularly-assigned stations may be in the central office garage.

September 29, 1988 the Assistant Principal of Gatewood Elementary, one of the schools which Mr. Lilly serves, assigned him a "curricular trip" which entailed the transportation of students on that day from Gatewood Elementary to Fayetteville High School for a presentation of the play "Sleeping Beauty" by Theatre West Virginia. Mr. Payne was similarly assigned to transport students from Beckwith Elementary to Fayetteville High School on the same day and when he attempted to decline the run because of a family illness, he was told by the Assistant Principal that he would have to take a "sick day" or "WC day" in order to be relieved of the trip. Both drivers completed the trips which began at approximately 8:30 a.m. and ended at approximately 11:00 a.m.⁴ Neither driver received compensation for the run.

Grievants contend the trip was an extra-duty assignment as defined in W.Va. Code §18A-4-8b(b), which in part provides:

For the purpose of this section, extra-duty assignments are defined as irregular jobs that occur periodically or occasionally, such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

⁴The drivers were required to remain at the high school until the play was over.

W.Va. Code §18A-4-8a provides the rate of compensation for such trips as follows:

The minimum pay for extra-duty assignments as defined in section eight-b [§18A-4-8b] of this article shall be no less than one seventh of the employee's daily total salary for each hour the employee is involved in performing the assignment and paid entirely from local funds. The salary for any fraction of an hour the employee is involved in performing the assignment shall be prorated accordingly. When performing extra-duty assignments, employees who are regularly employed on a one-half day salary basis shall receive the same hourly extra-duty assignment pay computed as though such an employee were employed on a full-day salary basis.

Grievant's request as relief payment for the September 29, 1988 trip in accordance with these provisions.⁵

⁵Grievant Payne additionally requests as relief the right to refuse any such assignments in the future. This request is predicated on the assumption that the assignment of September 29, 1988 was a substantial change in his work schedule which was prohibited by W.Va. Code §18A-4-8a, which in pertinent part provides:

No service employee shall have his daily work schedule changed during the school year without his written consent, and his required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

The assignment was obviously a deviation from grievant's schedule but did not constitute a substantial change which would trigger the application of these provisions. Accordingly, this particular part of the grievance is not further addressed herein.

The Board maintains that, pursuant to its Policy F-5 adopted December 14, 1982, drivers are not entitled to compensation for "curricular" runs until they exceed the established forty (40) hour work week. That policy provides:

"Student" class trips of an educational nature which are related to on-going classroom instruction. Curricular trips will be considered to the extent that they provide the most effective means of accomplishing objectives related to stated aspects of the instructional program within the classroom. Curricular trips are considered as a means of instruction and are to be planned as such with definite objectives determined in advance.

The same policy provides that "Curricular trips made during the regular school hours are considered a part of the driver's job assignment and no extra remuneration is given. Drivers making extracurricular trips outside of regular school hours are to be reimbursed by the Board of Education...." The Board additionally asserts that bus operators may be assigned uncompensated runs during their regular workday if such runs have been uncompensated in the past. This position appears to be based, at least in part, on an opinion of the State Superintendent of Schools dated September 2, 1988, which reads

If assignments made during regular school hours and during the bus operator's regular work day had not been compensated for by additional pay in the past, then additional compensation was not mandated under W.Va. Code 18A-4-8b(b) and W.Va. Code 18A-4-8(a), as amended.

Implicit in the Board's position is a contention that since the grievants only work four (4) hours and forty (40) minutes per day and are compensated for eight (8) hours work, pursuant to the requirements of W.Va. Code §18A-4-8a, they are essentially on call for the remaining three (3) hours and twenty (20) minutes and can be given uncompensated assignments during those hours.

The latter assertion of the Board is not particularly relevant to the circumstances of the grievance and similar contentions have previously been rejected. See Swiger v. Doddridge County Board of Education, Docket No. 09-88-092 (August 31, 1988); Terek v. Ohio County Board of Education, Docket No. 35-87-294-3 (July 20, 1988); Bengey v. Summers County Board of Education, Docket No. 45-86-056 (October 7, 1986). The Board's payroll records (Exhibit No. 10C) characterize grievants' wages as compensation for an eight (8) hour workday but that is not a true representation of the manner in which they are paid for the duties they perform. Grievants work four (4) hours and forty (40) minutes per day for an amount established in W.Va. Code §18A-4-8a and their true hourly rate of pay can only be derived through a division of that amount by those hours. To say they are somehow awarded pay for work they do not perform and therefore may arbitrarily be assigned duties to reach an eight (8) hour workday is an unreasonable interpretation of the pertinent provisions of

§18A-4-8a. As noted in Swiger, supra, many bus operators are employed elsewhere during the hours between their morning and evening runs.

Similarly the Board's assertion that the trips in question were "curricular" in nature and, as such, uncompensated ones under its own Policy F-5, is without basis. That policy provides a very narrow definition of the term "curricular" and clearly requires that before any student class trips can be so labeled, they must be directly related to a stated educational goal. While the play "Sleeping Beauty" might conceivably have some educational value, there was no evidence presented that it was in any way part of on-going classroom instruction. Therefore, the trips were compensated runs of an "extracurricular" nature according to the Board's own Policy F-5. Moreover, regardless of that policy, the runs clearly fall within the definition of extra-duty assignments contained in W.Va. Code §18A-4-8b(b) and should have been compensated according to the provisions of W.Va. Code §18A-4-8a. The latter provisions could not be given effect if the position of the Board and the State Superintendent of Schools was adopted and the only logical interpretation of the corresponding Code sections is that bus operators must be compensated at a rate of one-seventh (1/7) of the employee's daily total salary for assignments which are over and above said employees' normal duties.

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

FINDINGS OF FACT

1. Grievants, Buren Payne and Norman Lilly, are employed by the Fayette County Board of Education as bus operators.

2. On September 29, 1988 grievants were required to transport students to and from certain elementary schools to Fayetteville High School for a presentation of the play "Sleeping Beauty".

CONCLUSIONS OF LAW

1. An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

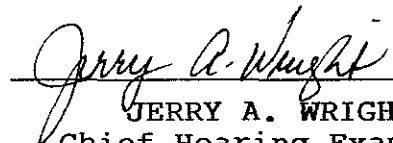
2. The runs in question were not curricular as defined in the Board's Transportation Policy F-5 and should have been compensated extracurricular runs pursuant to said policy.

3. The runs in question also fall within the definition of extra-duty assignments contained in W.Va. Code §18A-4-8b(b) and should have been compensated pursuant to the provisions of Code §18A-4-8a.

Accordingly, the grievance is **GRANTED** and the Fayette County Board of Education is hereby **ORDERED** to compensate the grievants,

Buren Payne and Norman Lilly, for the runs made on September 29, 1988 at a rate of one-seventh (1/7) of their respective daily total salaries for each hour said runs required.

Either party may appeal this decision to the Circuit Court of Fayette County or the Circuit Court of Kanawha 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.



JERRY A. WRIGHT
Chief Hearing Examiner

Dated: March 10, 1989