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LEWIS W. MARRS

v.

Docket No. 89-09-278

DODDRIDGE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Lewis Marrs commenced regular employment with respondent Doddridge County Board of Education (DCBE) in September 1987 as a "half-time" bus operator and has been paid one-half the scheduled salary since that time. He filed a level one grievance on April 12, 1989, with complaint that he was entitled to full-time compensation because his duties were similar to those of other bus operators who were being paid full-time wages. Grievant's supervisor responded at level one that "I have no right or power to alter or modify [your] contract." Likewise, grievant did not prevail at levels two or

three.<sup>1</sup> The grievance was advanced to level four June 12, 1989, with request for a decision based on the record below.<sup>2</sup>

In September 1987 DCBE posted two bus operator vacancies, one as a full-time contract for bus No. 9 and the other, a half-time contract for bus No. 14-A. Grievant and another operator who bid on the jobs had equal employment time, apparently as substitutes, and a coin was tossed to determine who would receive the full-time position. Grievant won the toss. By letter dated September 2, 1987, he declined the full-time run "because of circumstances out of my control" and opted for the alternate half-time run.

Grievant said he knew when he opted for the half-time contract he would receive only half-time wages. He stated that, although he initially believed a half-time contract would be for either a morning or afternoon run, he eventually knew when he accepted the position in question that he would have a "split-shift" morning and evening run. He added that he did not know

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<sup>1</sup>A level two hearing was conducted by then-Superintendent Raymond Frazier on April 28, 1989. Mr. Frazier rendered a decision May 2, 1989, with a three-sentence response denying the grievance. On June 1 DCBE conducted a level three hearing; On June 6 it issued a statement-decision upholding the level two decision. Lengthy findings of fact and conclusions of law were included in the record as part of the level three disposition.

<sup>2</sup>The record contains a letter dated July 10, 1989, from James E. Bennett, the present Superintendent, who agreed to the waiver of a level four hearing. Grievant submitted fact-law proposals July 31, 1989. It is assumed DCBE will stand on its level three findings, conclusions and decision. This matter was originally assigned to the Elkins hearing examiner but transferred to the undersigned on or about October 18, 1989.

until he actually drove the route that other full-time operators had driving assignments of similar duration and distance but were paid full-time wages. He emphasized that, in his opinion, the split-shift nature of the assignment also rendered it full-time.

There is no dispute that grievant's daily driving assignment is nearly identical in time and distance to that of approximately seven other operators holding full-time contracts. Like grievant, those full-time drivers complete their split-shift morning and evening runs in less than three and one-half hours. Also undisputed was grievant's assertion that he received benefits such as sick and personal leave days accorded to full-time employees.

At level two, bus operator Mike Stickel described his full-time position/assignment. According to Mr. Stickel, his split-shift driving times, from 7:00 until 8:15 a.m. and 3:15 until 4:30 p.m., were "exactly the same" as grievant's. T2.3

Ora Ford, Coordinator of Supportive Services and grievant's supervisor, appeared on behalf of DCBE. He said that the runs similar to grievant's were established as full-time runs several years ago and "cannot be changed without reason to do so." He stated:

In other words, if a person was put on full-time run you can change that run back to a half-time run, or whatever. Now I think the reason this run [grievant] is on is a half-time run was, at the time, there was two runs. One man did both of these runs. And, it was deemed that it was too much time for one person. So they made the Arnold's Creek run or the one that [grievant] has now, a half-time run. These other runs could be extended if the need was proven and needed. It could be worked in the schedule and so forth. But

[grievant's] run cannot be changed to be any longer than it is because he is only compensated for half-time.

So that is the distinction we have between Mr. Stickel and [grievant's] run.

Mr. Ford continued his discussion on Mr. Stickel with an explanation that Mr. Stickel's time could be extended "within his seven hour day"<sup>3</sup> for need, but no more time could be added to grievant's work time.<sup>4</sup>

At level three, DCBE member Cleveland Robinson questioned why grievant had not filed a grievance earlier if he was dissatisfied about the situation. Grievant responded that at least three or four other drivers who previously held the run in question had been dissatisfied but the "understanding" among the men was that probationary employees would not be retained if they filed a grievance. Mr. Robinson agreed that all of them had approached him about it but that he just told them they knew what they were getting and that he was "not in favor of giving full-time on it." T3.4 Another DCBE member responded that those men had no basis in fact to believe as they did.

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<sup>3</sup>Mr. Ford's comment about Mr. Stickel's "seven hour day" was the only reference to what might be an established workday for bus operators. However, his comment cannot be construed to represent an operant policy since no such policy, written or otherwise, was formally submitted into the evidence.

<sup>4</sup>Grievant refuted Mr. Ford's statement and said his route had increased by duration, distance and students since he began the run. He agreed though that it had not expanded beyond three and one-half hours' duration.

In his fact-law proposals, grievant contends that his half-time status "is a continuing practice that arises every workday." In support of his position in this matter, grievant relies on the uniformity provision of W.Va. Code §18-4-5b:

. . .[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[.]

He also cites Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), for the proposition that "school personnel regulations and laws are to be strictly construed in favor of the employee." He requests as relief that he be awarded full-time wages henceforth and back wages for the 1988-89 school year.

DCBE's level three decision noted the following Findings of Fact: "Grievant did not respond within fifteen days of employment of his grievance." Its Conclusions of Law, among others, are as follows:

-- [When grievant] accepted the half-time run, [he] was aware that he would make a morning and evening run and would work less than 3-1/2 hours per day, all in accordance with the contract he entered into with . . . [DCBE].

-- [Grievant's] half-time run . . . cannot be extended in time in excess of 3-1/2 hours as opposed to a full[-]time run.

-- [DCBE] cannot legally compensate [grievant] at a rate of full-time pay for contracted half-time work which entails less than 3-1/2 hours per day.

-- [DCBE] hired [grievant] as a half-time employee; [grievant] is working less than 3-1/2 hours per day and therefore . . . [DCBE] has no statutory authority to pay him for a full day of work.

Besides DCBE's reliance on Code §18A-4-8a that it must pay grievant one-half "the minimum monthly pay" set forth in the statutory pay scales, it proffered no other basis in law or

policy to support its position or otherwise limit grievant's monetary recovery in this matter.

The statutory scheme for service personnel employment does not specifically recognize a "half-time" employee. W.Va. Code §18-1-1(i) sets forth this definition concerning employment:

"[R]egular full-time employee" shall mean any person employed by a county board of education who has a regular position or job throughout his employment term, without regard to hours or method of pay [emphasis added].

Code §18A-1-1(a) states that,

[s]chool personnel shall mean all personnel employed by a county board of education whether employed on regular full-time basis, an hourly basis or otherwise.

Code §18A-4-8a notes that a service employee "whose employment is for a period of more than three and one-half hours a day" shall receive at least the minimum pay scale/grade on the schedule and if the employment is for a period less than three and one-half hours, the pay shall be at least one-half the appropriate scheduled amount. Section eight-a further addresses a limited employment situation as follows:

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 [emphasis added].

The statute suggests that employment of less than three and one-half hours a day contemplates an employee who performs his or her duties on a one-half day salary basis rather than a full-day salary basis.

While school law does not explicitly provide monetary relief for service employees other than custodians with

"split-schedules," see Code §18A-4-8, §18A-4-8(a) strongly implies that half-day employment is an employment period comprised of consecutive hours in some portion of a day. Finally, nothing in the statutory language precludes a school board from paying employees who actually work less than three and one-half hours regular wages, for the law simply provides a minimum wage for such employment. In this instance, DCBE has apparently opted to pay at least one-half dozen of its bus operators full-time wages for less than three and one-half hours' work. DCBE's failure to compensate grievant in the same manner is a present violation of Code §18A-4-5b. Therefore, grievant's filing is timely and he is entitled to the relief he requested.

#### FINDINGS OF FACT

1. In September 1987 grievant accepted employment for a split-shift bus operator position posted as a half-time contract for half-time wages.

2. Grievant later learned his assignment was identical to the driving schedules of at least seven other earlier-hired employees who received full-time wages, specifically, he and the others all worked less than three and one-half hours per day.

3. Grievant did not file a grievance on the matter until the 1988-89 school year and limited his requested monetary relief to that fiscal year.

## CONCLUSIONS OF LAW

1. W.Va. Code §18A-4-8a requires that a board of education pay a service employee who works less than three and one-half hours per day at least one-half the appropriate scheduled wages.

2. A county board of education must pay its service employees performing like duties in a uniform manner, W.Va. Code §18A-8-5b.

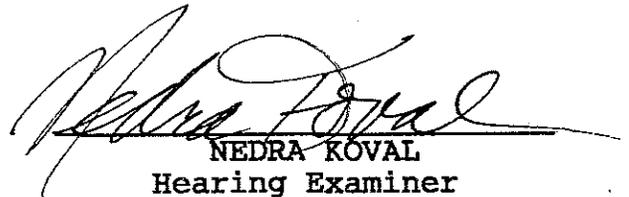
3. DCBE has chosen to pay its regularly employed bus operators who work less than three and one-half hours at full statutory wages. It is within the scope of DCBE'S authority and indeed its nondiscretionary duty to pay grievant the same wages it pays other operators who work less than three and one-half hours.

4. DCBE's disparate treatment of grievant with respect to his wages is a present violation of Code §18A-8-5b; therefore, grievant's April 1989 filing was timely.

Accordingly, this grievance is **GRANTED** in its entirety and Doddridge County Board of Education is **ORDERED** to compensate grievant the same wages as it pays other drivers who perform similar duties and to pay grievant back wages beginning the 1988-89 fiscal year, the time period he filed this grievance.

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

DATED: November 30, 1989



NEDRA KOVAL  
Hearing Examiner