



**Members**  
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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
**GASTON CAPERTON**  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

LUCIAN ISAACS, et al.

v.

Docket No. 89-22-555

LINCOLN COUNTY  
BOARD OF EDUCATION

D E C I S I O N

Grievants,<sup>1</sup> employed by Respondent Lincoln County Board of Education as bus operators, filed a grievance on June 13, 1989, alleging,

Violation of county past practice in regard to granting of a compensation day for bus operators attending Rodeo Day on May 20, 1989 (W.Va. Code 18-29-2, section a). Relief sought is granting of day, travel expenses and promised jackets.

While the record does not provide the disposition at Level I, at Level II the evaluator allowed travel expenses, but otherwise denied the grievance. Consideration was waived at Level III and Grievants appealed to Level IV September 18, 1989. Although Grievants initially requested a hearing, thereafter the parties agreed to submit stipulations for

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<sup>1</sup>Grievants are Lucian Isaacs, Doug Skeens, Timothy Payton, Donald R. Miller, Carlos Stratton, Alvin Watts, Jimmie Skeens, Michael Skeens, Charles Brunty, Nancy Harris, and Willis Roy.

consideration in conjunction with the Level II record. With receipt of proposed findings of fact and conclusions of law from both parties on and before December 7, 1989, this matter may be decided.

The record establishes that the bus operators have participated in the rodeo for three years. In Spring 1987 those who participated received both a day of compensatory time and a jacket; in 1988 they received only the compensatory day; and in 1989 they received neither. While it is not clear that Grievants are contending that "past practice" requires that they be provided the jackets, no such continuous "past practice" has been established since, as Grievants' proposals recognize,<sup>2</sup> the jackets were not provided in the prior year.<sup>3</sup>

Regarding their argument of a past practice of awarding compensatory time, Grievants simply refer to the definition of grievance at W.Va. Code §18-29-2(a), not specifying which part thereof they rely on or why it provides them a cause of

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<sup>2</sup>Grievants stated in their Finding of Fact 4 that drivers who participated in the first rodeo received "a jacket and a comp day" and in their Finding of Fact 5 that drivers who participated in the second rodeo received "a comp day."

<sup>3</sup>The parties entered a stipulation, "According to past practice, all drivers participating in the rodeo received a comp day and a jacket." If that stipulation was intended to establish that it has been Respondent's consistent practice to supply jackets, it is not accepted because it is contrary to the clear record. It is accordingly accepted as only stating that in the past, in 1987, jackets were supplied.

action of "violation of past practice," as they allege. Regarding past practice, the definition merely states that the grievance may allege "any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board." Nothing in this decidedly confusing provision<sup>4</sup> necessitates that, just because a board of education has taken an action one year, it must do the same thing the next, and Grievants have not indicated that there was any legal requirement that Respondent provide compensatory time for participants in the rodeo, as it had in the prior years.

The parties stipulated, "Johnnie Adkins, Transportation Director, made it clear to the drivers that everyone who participated in the rodeo on Saturday would receive a comp day." Grievants make a final, equitable argument, contending that they reasonably relied on that representation. However, Grievants apparently fail to recognize that, in order to establish reliance, it was necessary to show that, because of that representation, they acted to their detriment. See Syl. Pt. 4, Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965). There was no stipulation entered regarding such detrimental reliance, and six of the

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<sup>4</sup>While the use of "aggrieved" is less than clear, it cannot mean that, just because an employee is unhappy with a practice of a board of education and grieves it, his complaint has merit.

grievants<sup>5</sup> did not testify. Of those who did testify, only the following testimony of Michael Skeens establishes such reliance: "I asked Johnnie Adkins before we went up there if we would get a day off and he said, 'Yes.' I wasn't going to go if we didn't get it." Tr. 12. While Grievant Timothy Payton stated, "I wouldn't have spent my time going up there if it wasn't for the jacket and the day off," Tr. 11, he otherwise was more equivocal, stating only that "probably not" would he have gone if he had not thought he would get the compensatory day. Tr. 10. Moreover, his testimony did not establish that he was relying on any representation. In fact, after stating he had been "promised" the jacket,<sup>6</sup> on cross-examination he admitted that there were only "rumors" that the jackets would be provided and Mr. Adkins had not so promised. Rather, the record indicates that he simply assumed that he would be awarded compensatory time and a jacket. The testimony of Lucian Isaacs and Jimmy Skeens was silent on whether they relied to their detriment on Mr. Adkins' representations. Doug Skeens testified that he "probably" would have driven in the rodeo even if he had known he would not get compensatory time.

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<sup>5</sup>Donald R. Miller, Carlos Stratton, Alvin Watts, Charles Brunty, Nancy Harris, and Willis Roy.

<sup>6</sup>Grievants do not contend that the jackets were promised and their reliance argument only relates to the compensatory day. It is noted, in any case, that no credible evidence would support a finding that the jackets were promised.

Respondent asserts as a defense, "Only the Superintendent of Schools has the authority to approve compensatory time for employees, Lincoln County Policy Manual 8-09.00[,]" Respondent's Proposed Conclusion of Law 1, further contending that that compensatory time must be approved before it is taken under that policy. Respondent relies on a statement of the policy that "The Superintendent and/or his designee are the only persons authorized to grant overtime." There is nothing in this record that would indicate that Mr. Adkins was not empowered as the Superintendent's designee to authorize compensatory time to his supervisees, the bus operators. Moreover, while the policy does provide, "All overtime must have prior approval," there was no showing that Mr. Adkins did not provide Mr. Skeens such prior approval, which may have been subsequently rescinded.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

#### Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988); Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1988).

2. Grievants failed to establish that Respondent was required by law to continue its prior practice of providing compensatory time to bus operators who participated in Rodeo Day.


3. The evidence did establish that Michael Skeens reasonably relied to his detriment on the representation of his supervisor, Johnnie Adkins, Director of Transportation, that he would receive a compensatory day for participation in the May 20, 1989, Rodeo Day, for Mr. Skeens testified that he would not have so participated if he had not been promised a compensatory day by Mr. Adkins. Equitable estoppel accordingly applies to Mr. Skeens's claim. See Syl. Pt. 4, Barnett v. Wolfolk, 149 W.Va. 246, 140 S.E.2d 466 (1965). No such showing was made regarding the remaining Grievants' claims.

4. Respondent did not establish a defense of noncompliance with Lincoln County Policy 8-09.00.

Accordingly, Michael Skeens's claim is **GRANTED** only insofar as it requests one day of compensatory time; the grievance is otherwise **DENIED**.

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

  
SUNYA ANDERSON  
HEARING EXAMINER

Date: January 12, 1990