



Chow

REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

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

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

PEGGY MOSS, et al.

v.

DOCKET NO. 01-88-259

BARBOUR COUNTY BOARD OF EDUCATION

DECISION

Grievants, thirty-nine service personnel employed by the Barbour County Board of Education (Board), filed a level four grievance appeal on January 19, 1989 in which they alleged that

[o]n Labor Day week (9/04/88 - 9/10/88), ...[we] worked in excess of our normal working day. Normal working day for bus operators is defined as the amount of time it takes to make our morning and afternoon runs. According to 18A-4-8a we are to be paid overtime. Mr. William E. Phillips, Superintendent of Schools, has indicated he will not do so. The Board of Education is, therefore, in violation of this law. We want to be paid according to law the overtime pay that is due for this Holiday week for any such affected employees plus interest due from the date earned to date actually paid.

The parties determined that the grievance, which had not been addressed at level one due to lack of authority by the immediate supervisor to grant the requested relief and denied at levels two and three, could be submitted for

decision upon the record; proposed findings of fact and conclusions of law were submitted by June 16, 1989.

The facts of this matter are not in dispute. During the week of September 4, 1988, which included the Labor Day holiday, Ms. Moss, and possibly other grievants, completed extra-duty assignments for which they were compensated at the regular extra-duty hourly rate of one-seventh their daily salary. The grievants argue that they were entitled to compensation on a time-and-a-half basis in compliance with W.Va. Code §18A-4-8a which provides that "[a]ny full-time service personnel required to work in excess of their normal work day during any week which contains a school holiday for which they are paid shall be paid for such additional hours or fraction thereof at a rate of one and one-half times their usual hourly rate...".

The Board argues that because the acceptance of the extra-duty assignments is not required but is within the discretion of the employees, the provisions of W.Va. Code §18-4-8a do not apply and it is not required to compensate the grievants at the time-and-a-half rate. The Board further contends that by establishing a minimum hourly rate for extra-duty assignments, the Legislature set the amount of compensation for such assignments whenever they are accepted by the employee.

The grievants respond to the Board's argument that they were exempt from overtime compensation because they were not required to work by citing from Hours Worked Under the Fair

Labor Standards Act, U.S. Department of Labor, Employment Standards Administration, Wage and Hours Division; W.H. Publication 1344 [Revised March, 1976] which defines "hours worked" as follows:

in general, includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all time when the employee is suffered or permitted to work for the employer.

Work which the employer does not request but permits is work time. For example, employees may voluntarily continue to work at the end of the shift. They may desire to finish an assigned task, correct errors, prepare time or production reports. The reason is immaterial, as the time must be counted as hours worked if the employer knows or has reason to believe that the employee is continuing to work. This basic rule also applies to work performed away from the employer's premises or the job site, or even at home.

The Board's argument that the grievants were not required to work is somewhat misleading. While the grievants were free to decline the assignments, the scheduling of the extra-duty runs required that the Board assign drivers to those trips. In that respect the work was required by the Board which was then required to offer the assignments to the drivers as they appeared on the rotating duty list. Having determined that the work was required within the meaning of Code §18A-4-8a the grievants are entitled to compensation at the overtime rate for any extra-duty hours worked during the week of September 4, 1988. See Kerekes, et al.v. Ohio County Board of Education, Docket No. 35-87-130-3 (Nov. 18, 1987).

Regarding the Board's second argument, the statutory designation of a minimum hourly wage for extra-duty assignments does not address overtime work and provides no basis upon which the Board's interpretation can be justified.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievants are employed as bus operators and/or mechanics by the Barbour County Board of Education.

2. During the week of September 4, 1988 (which included the Labor Day holiday) a number of the grievants worked in excess of their normal work day as a result of their accepting extra-duty assignments.

3. The grievants were paid at their regular hourly wage, not overtime wages, for the additional hours they worked.

Conclusions of Law

1. Service personnel who are required to work in excess of their normal working day during any week which contains a paid holiday are entitled to compensation at one and one-half times their usual hourly rate for the additional hours worked. W.Va. Code §18A-4-8a.

2. The grievants' extra-duty work during the week of September 4, 1988 required that they work in excess of their normal working days and entitles them to compensation for such work at one and one-half times their usual hourly rate.

Accordingly, the grievance is **GRANTED** and the Board Ordered to compensate the grievants consistent with the provisions of this decision.

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

DATED:

January 31, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER